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No. 277.

THE NORTHERN SECURITIES COMPANY, THE GREAT NORTHERN RAILWAY COMPANY, THE NORTHERN PACIFIC RAILWAY COMPANY, AND OTHERS,

APPELLANTS,

v.

THE UNITED STATES,

RESPONDENT.

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I C U

RAILWAY "MERGERS" OPERATING A SUBSTANTIAL DIVISION OF TERRITORY THE RESULT OF AN IRRESISTIBLE TREND OR TENDENCY IN RAILWAY DEVELOPMENT — THEIR INEVITABILITY AS DISCLOSED IN THE HISTORY OF RAILWAY COMBINATION AND AMALGAMATION THROUGHOUT THE WORLD — THEIR CONSONANCE WITH PUBLIC POLICY — THEIR ECONOMIC VALIDITY — CONSTITUTIONAL CONSIDERATIONS.

ARGUMENT *AMICUS CURIAE.*

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In the Supreme Court of the United States.

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The Northern Securities Company, The Great Northern Railway Company, The Northern Pacific Railway Company, and Others,

appellants,

v.

The United States,

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ARGUMENT *AMICUS CURIAE.*

STATEMENT.

Whatever may turn out to be the technical legal quality or character of the Northern Securities Company in respect of its promotion, organization and operation, as it may ultimately be fixed by the final judgment of this court, or, in other words, whatever it may at the end be held to be as matter of law—and putting that question and those considerations quite aside for the moment—it is a fact, which sufficiently appears in the record and out of it, that what was sought to be accomplished and all that is actually accomplished through the Northern Securities Company is a unity of inter-

est between the owners of two lines of railway doing business mainly in the same territory. There has been brought about a community of interest between the owners of what the Circuit Court found to be two heretofore rival and competing lines, growing out of the ownership by the Northern Securities Company of a majority of the shares of the two companies. The creation of the Northern Securities Company was designed to place and does place the ownership of these shares in a single interest, and it was no doubt designed to make for and certainly does make for economy in the operation of the properties. Whatever else it may be and whatever else it may do, it certainly is and does that. When we eliminate the rhetoric on the one hand and the explanation on the other, this stands out as the one essential fact.

A shareowners arrangement *inter sese.*

Furthermore, it also appears in the record that the scheme put into effective operation through the Northern Securities Company is an arrangement entirely between the owners of two formerly rival and competing lines of transcontinental railway, and not between the two companies, or between them and the public. In other words, it is a sort of an indirect corporate arrangement between the shareowners of two railway companies, and is strictly *inter sese.* It affirmatively appears that neither railway company is a party directly or indirectly to it;

and it does not appear that the scheme in operation interferes with, affects, abridges or takes away any right which any member of the public has, or ever had, to fair treatment at the hands of either company as a common carrier, or that it has or can have any tendency so to do, unless the mere ownership of the shares of the two companies be held to be a direct restraint of trade. Neither does it appear to curtail, limit or emasculate, to any, even the slightest, extent, any right which any shipper or other person has, or ever had, to invoke the aid of the courts if and when they are injured by any default or wrong-doing on the part of either company.

None of the rights of the public is effected one way or the other by the arrangement. The two railways are just as much bound as they ever were to perform all their duties to the public; and they are just as liable as they ever were to suit at the hands of any patron or other person whom they may wrong or injure in any personal or property right. They are each of them also and equally as much holden as ever to perform all their duties to the State and to the General Government. They are as much as ever the subjects of governmental regulation—State and Federal—as to the rates they may charge for the service they render, and as to the manner in which such service is to be performed. It does not appear that the arrangement in question was designed, or could have any tendency if

designed, to shield or protect either of the companies as common carriers in respect of any duty owed by either of them to anyone, or that in fact it has or can have any effect upon any of their relations either to the people or to the State or to the Federal Government, unless it be held that this ownership of the shares of the two companies is in and of itself a suppression of competition, and to that extent such restraint of trade as is forbidden by the Sherman law.

The public not affected.

The public still has in full every remedy it ever had for any wrong it may ever suffer; and the plenary powers of the State and of the Federal Government to control the operation and management of the two railways in all respects, as provided by law, is in no degree abridged. The position of the two companies, *qua* the people and *qua* the government, is exactly what it was before the Northern Securities Company was organized, except upon the theory of the effect of the ownership of the shares just referred to, and unless the power incident to the ownership of a majority of the shares is *in se* restraint of trade. It does not appear that either the people or the government are put in a worse position by the arrangement, but it does affirmatively appear that the owners of the property are put, or believe they are put, in a better financial position. In other words, no outside interest is affected, and the owners of the two lines are, or think they are, benefited.

Under present conditions in the United States there can be no competition among railways helpful in any way to the public. The law taken in connection with the system of joint tariffs universally in force between connecting lines now renders all that legally and actually impossible. Every duty which it has been thought the railways of the country owe the public is expressly declared and enjoined upon them by the Interstate Commerce law and its amendments. This statute, for example, requires the publication of rates, prohibits their change without notice, makes unlawful a greater charge for a shorter than for a longer distance, forbids pooling and discrimination in every form, etc., etc. There are similar local laws in each of the States; and Commissions, State and Federal, everywhere see to their due enforcement. Competition between railways, therefore, in any real sense, as affecting shippers, is now as impossible with us as anything well can be, because railways are not allowed to do anything in favor of one shipper as against another which amounts to competition. Declamation about securing by statute or judicial decision a free and unlimited competition between parallel and competing lines, so that all the interests of the public may be sacredly safeguarded, *et cetera*, *et cetera*, is, consequently, mere cajolery—something to catch and mislead the unthinking. It is heard mostly about election times, as a shibboleth of party politics.

Legal competition practically eliminated.

A financial arrangement.

The arrangement sought to be invalidated by this suit being, therefore, one between shareowners *inter sese*, and not affecting either the two railway companies or the public or the government, is entitled upon this appeal to an adjudication in the light of these facts. If it be a fact that the existence of the Northern Securities Company and what it accomplishes does not diminish or curtail any of the rights of the public to good and efficient railway service; and if it be a fact that the two railway companies, as servants of the public, are as much as ever obliged to do their whole duty to the public as their patrons, and are as much as ever subject to suits and actions at law if they fail therein; if the arrangement in question does not make suits against them more difficult, or in any way operate to complicate or restrain the action of the law against them; if it does not diminish or take away any right of the public, or augment any privilege of the common carrier; if as public carriers and public servants they are no better off, and if their patrons as shippers are no worse off; if finally all these rights, duties and relations are unaffected one way or the other by the arrangement, then the Northern Securities Company is entitled to an adjudication at the bar of this Court without reference to such rights, duties and relations, and to stand or fall on its merits, as a modern scheme or method of American railway regulation, supervision and control on the finan-

cial side. In that state of case and upon that hypothesis it is competent to eliminate from the problem all these extraneous and ulterior considerations, to reduce the rhetoric of the subject to its lowest terms, to disregard the special pleading, to have regard as much as possible to the larger equities of the situation, and to consider the scheme of the Northern Securities Company along financial and practical lines.

It is very respectfully urged that it will not be unwise for this Court thus to consider this transaction at large and as a whole, and on its economic as well as on its legal side. If it be possible to believe that the possession of the bare power incident to the ownership of a majority of these shares—the mere right or the exercise of the right to vote upon them—constitutes in some way and in some legal sense some such restraint of trade as is forbidden by the statute invoked, it will be many times easier to believe that such an indirect, intangible and shadowy restraint* (whatever it is, at the most) is nothing and quite fit to be disregarded as compared to the benefits to the real parties in interest, which are asserted to arise from the arrangement—as compared to the economies which it works, the stability of ownership which it secures, the maintenance of the *status quo*, the orderly, con-

*"If shape it might be called that shape had none
Distinguishable in member, joint or limb."

catenatious and prudent operation of the financia affairs of the two companies, and the consequent obvious advantages to the owners of the properties *without any, even the slightest, offset by way of disadvantage to the public.* If it have much sound economic value along these lines, and otherwise, as in the judgment of the owners of the two properties it seems to have, that may be sufficient in this court to outweigh whatever trifling, fanciful or technical objection may be possible to be urged to it on strictly legal grounds. It is matter of common knowledge that men in these days of keen competition in business enter into combinations—form partnerships or "mergers"—in order to get and to increase trade, not to restrain it, to build up and not to pull down the general commercial prosperity of the community.

Essentially an economic question

It is the more reasonable for us to ask consideration of the questions involved on this appeal along these lines, because at bottom the larger issues in this case are economic more than legal, and, when the extraneous issues are eliminated, the real question is in fact essentially economic, because it appears that the arrangement attacked in this suit affects the internal and not at all the external affairs of the two companies. It touches the interests of the shareowners of two private corporations, and not the interests of the railway companies as common carriers. Upon further consideration it may seem to be a

combination in restraint of waste more than one in restraint of trade. It was conceived and promoted to facilitate the financial operation of the two properties, and to work economics in the management of the two lines, primarily and as far as appears, solely in the interest and for the pecuniary benefit of the owners. That was a lawful purpose and it was economically a sound purpose. Whenever, if ever, what is done in this direction goes beyond that and injuriously affects any outside interest—public or private—the shipper or the State, then and then only it becomes unlawful, and then and then only it is, as in any other case of wrongdoing by anybody, obnoxious to legal proceedings in the proper tribunal. But that would be another story, and that is not this case.

SYNOPSIS OF ARGUMENT.

I shall in this argument discuss four propositions which taken together comprehend the view I seek to present, and which seem to me to cover the ground upon this particular phase of the controversy:

First: Such arrangements between railway owners as that effected through the Northern Securities Company are the result of an irresistible trend or tendency in railway development everywhere, and are inevitable.

Second: They are, therefore, not contrary to public policy, and it is open to this Court so to adjudicate upon this appeal.

Third: They have not in the past been, and cannot in the future be, at all prevented by adverse legislation or judicial decision.

Fourth: Any statute which opposes itself to such a trend or tendency in railway development is economically unsound. Such unsoundness is not to be presumed of any general federal statute; and when one construction of such a statute opposes it to such trend or tendency, while another, equally open to the Court, puts it in harmony therewith, the Court is remitted to the latter construction.

That is the case as I conceive it.

ARGUMENT.

I.

These "mergers" operating a substantial division of territory are the result of an irresistible trend or tendency in railway development everywhere, and are, therefore, inevitable.

This proposition, put forward as the statement of a fact in railway history, is either true or false; and its truth is to be tested by an appeal, *seriatim*, to the history of railways and railway development in each of the chief countries in the world. I shall devote no time to the history of railway consolidation in this country, because whatever

the Court may not be assumed to take judicial notice of within the limits of its own jurisdiction, seems to have been carefully compiled and made a part of the record upon this appeal.

An economic evolution.

The promotion, organization and existence of the Northern Securities Company is a phase or manifestation of a world-wide tendency to combine and consolidate railway lines operating in the same territory. This tendency manifests itself in every country in the world of any commercial consequence where there are railways, and most strongly in those countries which exhibit the highest and most complicated commercial development. Sometimes it takes one form and sometimes another, but it everywhere exists as a dominating and controlling force in railway economics. The practical result sought to be accomplished by the formation of the Northern Securities Company is found to differ in no material respect or degree from what is done and accomplished in railway management, operation and control—in one way or another—in almost every state in the Union and in every considerable country on the globe where there are railways. Mergers of parallel and competing lines of railway —in one shape or another—so as to operate as a substantial division of territory between independent companies, are a natural and absolutely inevitable result of the normal growth and development of that modern scheme of trans-

portation by rail lines which obtains everywhere. They are arrangements of universal and world-wide acceptance, validity, utility and inevitability. The history of the matter throughout the world in detail fully supports this proposition.

First, then, let us consider the history of railway construction and consolidation in England and France, and then on the Continent of Europe generally, and elsewhere. I commence with the English railways only because they are the best illustration of the truth of the propositions I have laid down; and because our case in the United States is most like theirs in England. Our methods and mistakes in railway-making have unfortunately been much the same as theirs—haphazard, competitive and wasteful. France is properly considered next, because the French lines are the best examples of sound methods in railway building and financiering, and in their governmental regulation and control—or, in other words, of how to do it, as these in England are of how not to do it. The sharp contrast is, therefore, instructive. Railway experience elsewhere in the world, to which less detailed attention is given, emphasizes, however, the truth for which I here contend.

English railways

In February, 1872, a Select Joint Committee on Railway Companies Amalgamation was appointed by the two

Houses of the English Parliament to investigate and report back the condition of the railways of Great Britain, particularly in respect of the consolidation of lines and the division of territory among the greater companies. Mr. Chichester Fortescue, in moving the appointment of the Select Committee in the House of Commons, on February 23, 1872, said that "twenty years ago a Committee had reported against the system of amalgamation, but since that Committee reported amalgamation had gone on as merrily as before—the fact being that 5,000 miles of railway had been added to the greater railways since that time." (209 Hansard's Parliamentary Debates, 943.)

Report of the Committee of 1872.

This Committee called a great number of witnesses and went fully into the details of the matter throughout the British Islands, and on August 2, 1872, presented a voluminous report, from which it appeared that, from the commencement of railway construction in England down to the time of that report, Parliament and the English courts had united in efforts to prevent the consolidation of independent railway companies in that country, wholly without success. The facts reported by the Committee disclosed that by the end of the year 1843 seventy-one separate and independent lines had been constructed, averaging about thirty miles each in length. During the following year the average mileage per independent line was reduced one-half, so that by the end of the year 1844

the average was only about fifteen miles. Between 1844 and 1847, six hundred and thirty-seven separate companies had been chartered, with a total authorized length of about 9,400 miles of line. Eleven proposals, for example, were made to Parliament for lines of railway through a single narrow valley, where but one line was possible.

This impossible and uneconomic condition called so loudly for relief that consolidation began about 1847, and so proceeded, by the gradual absorption of the smaller lines by the larger systems, and by a consequent division of territory between the consolidated companies, that by 1872 it had come to pass that the railway business of the Kingdom was substantially performed by no more than about six of these great amalgamated companies.

The first English railway charters contained provisions intended to prevent competition both between the lines themselves and between them and the canals, especially in freight traffic. George Stephenson, the father of English railways, seems to have appreciated clearly the mischief to be avoided in the matter of competition, even at that early day, and he, therefore, set himself to the task of getting the railway system in that country started right in this particular. His view on this subject was summed up in his much-quoted saying that "where combination is possible, competition is impossible."

In 1836, a Mr. Morrison, M. P., from Inverness, made a remarkable speech in Parliament, in the course of a discussion of the then English railway situation, in which he pointed out with uttermost clearness that a railroad must in the nature of things be a monopoly; that competing roads will inevitably combine; that parallel lines are sheer waste of capital, and that fixed maximum rates are useless. (33 Hansard's Parliamentary Debates, 977 *et seq.*)

This utterance is the more remarkable because it stated clearly, at the outset of railway building and before there was any basis of fact and experience upon which to found such generalization, the ultimate principles which long experience has since demonstrated to be sound.

Settlement of the question in England.

Thus it is seen that the English railways started right; but that they soon got wrong, and for the first thirty years and more blunders in plenty were made in futile endeavors to construct and operate railroads on the principle of inter-competition. Uncounted treasure was wasted in these attempts, and absolutely nothing but experience was gained by it. By 1872 competition had been substantially eliminated through the operation of natural laws and in spite of hostile legislation and litigation. It was said in Parliament, in the debates over the appointment of the Select Committee in 1872, that there was not at that time a single competitive rate existing in the Kingdom. With the legislation of 1873 the general railway situation in

England was fixed and determined, and the fatuous agitation for competition ended. The railways ceased to be bugbears, and fears of mischief to the public from the growth of railway influence and power gave place to intelligent criticism of railway methods and to a public-spirited determination to get good service at fair rates while giving the companies a free hand to manage their finances in their own way. Thus, after nearly forty years of experiment, agitation and disturbance, the English people came back about 1872 to their point of commencement. Mr. Adams, in his "Railroads and Railroad Questions," says that then England "settled down on the doctrine of *laissez faire*"; and President Hadley, in his "Railroad Transportation," says "It might better be said that it has settled down on the policy of specific laws for specific troubles." By about 1872, as we thus see, the problem was solved by the operation of immutable economic laws, and the decision against competition between lines made beyond all possibility of reversion.

Summary of the English position,

To make a summary statement and to bring it quite down to date, it appears that in 1847 there were about 5,000 miles of railway in England, owned and operated by several hundred independent and competing companies; twenty-five years later there were 13,000 miles of railway, owned and operated by twelve partly competing companies; now there are a little over 15,000 miles, owned

and operated by about six non-competing companies. (Pendleton's Our Railways, their Origin, Development, Incident and Romance (London 1896); Paish's The British Railway Position, (London, The Statist, 1902).)

What the English people would have saved in squandered capital and wasted effort, if they had not abandoned the sound economic principles upon which they began to construct and finance their railways, and to which they ultimately returned, are sums too vast for computation. The futile effort to preserve the principle of competition between railways in England was the costliest blunder ever made outside of America in any single business matter by any people on the earth since time began. It was a form of insanity which Americans might well have avoided, and it is a sort of politico-mental disorder that American courts are not well employed in fostering and promoting.

The London & Northwestern line.

Let us take up the history of some of the greater English companies a little in detail. The London & North-Western Railway was first opened for traffic in 1837, about a month after the accession of Queen Victoria. In 1846, it consisted of a main line from London to Birmingham, with some insignificant branches. In 1852, a writer on the position of the company complains that it "fell a few years back into the error generally committed by railway companies of amalgamation with numerous other railway companies. From being a line from London to Birming-

ham 112½ miles, it has become a line or lines of 539½ miles long—five times its original length." Since that time it has increased its mileage nearly four-fold, and has merged into its system the Chester and Holyhead lines on the West and the Lancashire and Carlisle on the North, besides numerous smaller undertakings too numerous to mention. (Stevens' Investment & Speculation in British Railways, 79, 80.)

The Great Western line.

The Great Western Railway has been absorbing smaller independent lines in its territory for many years, and altogether considerably more than 100 have been so absorbed within the last forty years. Since 1896 it has taken over about 20 such lines, adding thereby 260 miles to its system. Of its total capital expenditure from 1892 to 1901, amounting to about 15½ millions sterling, nearly 5 millions represented amalgamations.

The North-Eastern line.

The North-Eastern Railway is a consolidation of various small lines which has resulted in a vast net work of railway in the Northeast of England without a single intruder in the territory in the shape of a competitor. The report of the Select Committee on Railway Amalgamation in 1872 contained the following reference to this line:

> "The case of the North-Eastern is a striking illustration. That railway or system of railways is composed of thirty-seven lines, several of which formerly

competed with each other. Before their amalgamation they had, generally speaking, high rates and fares, and low dividends. The system is now the most complete monopoly in the United Kingdom; from the Tyne to the Humber, with one local exception, it has the county to itself, and it has the lowest fares, and the highest dividend of any large English railway. It has had little or no litigation with other companies. Whilst complaints have been heard from Lancashire and Yorkshire, where there are so-called competing lines, no witness has appeared to complain of the North-Eastern; and the general feeling in the district it serves appears favorable to its management."

The Great Central line.

The Great Central Railway which was opened for all classes of traffic in April, 1899, has a total mileage of 665 miles. Of this mileage 465 belongs to it and 200 are jointly owned with other companies. In addition, the company owns 111 miles of canals and tramways. It is, therefore, a system essentially made up of joint lines and canals. It is also the newest line in England, and may stand for the most recent type of development in that country. (Stevens' Investment & Speculation in British Railways, 114, 115.)

Mr. Yerkes and Mr. Morgan, working independently for

London underground lines.

the time being, are revolutionizing, consolidating and rebuilding the antiquated system of underground railway in London, and are thus correcting the faulty competitive construction and operation of these lines hitherto. Their efforts, which are for the present sharply competitive, are working harmony between the former conflicting and competing interests, and are bringing order and system out of the old antagonism and confusion. Much new mileage and greatly improved facilities are and are to be the result. It now seems certain that in no very long time all intermural transit in London which is wholly or partly underground, aggregating nearly 225 miles in length, will be consolidated into no more than two great substantially non-competing enterprises, dividing the territory in a way between them, upon a line (roughly speaking) which runs northwest and southeast through Piccadilly Circus, or dividing, along non-competitive lines as much as possible, about Piccadilly Circus and converging severally therein. The Joint Parliamentary Committee of 1901 reported that it was desirable that the working of underground railways in and around London should be put under the control of some one consolidated interest; and if we read into the future of these underground lines the railway experience of the past in England above ground, that is sure to be the ultimate solution.

We consider in another place the recent amalgamation

of the South-Eastern and Chatham lines; and at this point it may be stated that the absorption of small undertakings by the larger railway systems has been continuously in progress in England, and is still proceeding.

French railways

The French railway system was developed a little later than the English, but we must look as far back as the reign of Louis XI, in the latter part of the fifteenth century, if we are fully to understand and appreciate that development. That sagacious and masterful prince, who reigned from 1461 to 1483, broke effectually the power of the great feudatories, and by a consolidation of authority in the crown laid the foundation of the absolute monarchy. His taking the postal service out of the hands of the feudal authorities and away from the cities and making it a matter of national administration, these four hundred years ago and more, was one of the most notable acts of his reign, and was in a way the first step toward the modern railway system of France. "Modern history," says President Hadley, in speaking of the nationalization of the French post-office, "—the history of nations as such—may almost be said to have begun at this point."

What Louis XI did for the power of the crown and for the postal service of the country, Louis XIV and Colbert did in laying the foundation of the national system of highroads and canals. The *Ecole des Ponts et Chaussées* was

founded, and trained engineers graduated therefrom laid out, constructed and perfected that splendid system of canals and highways, radiating from Paris and reaching every corner of the Kingdom, which long ago made France the first country in the world in its roads and waterways. There was from the beginning complete organization, intelligent survey and construction and strict supervision; so that an almost perfect system of lines of communication existed in France before railways were known. In no other country had such results been accomplished in road-making, and nowhere else was such completeness of organization and development possible. The genius of highways had in some sort come down to France as an inheritance from Rome, whose military roads were one of her most characteristic monuments.

In this state of case, with a perfect system of roads and canals already built and in operation—which made railways seem less necessary in France than in other countries—it is not strange that the French built railways slowly and cautiously. So it was not merely accidental that France moved tardily in this matter. It is not in the French character to make radical changes, or to do things piecemeal; and it was easy for her highway engineers to see that other nations were blundering in their first railway construction. The racial qualities that distinguish the French, their spirit of order and economy, their notion of proportion, and their

conservative good sense in business, all had something to do with their making haste slowly in railway building. It is very much the French way to let other people make the initial experiments in new things, and only to take a thing up when it is demonstrably sound and feasible. It is almost a racial instinct, and this is what happened in the development of French railways.

The French plan.

The result is that they now possess the only railway system in the world which was intelligently conceived from the outset as a unit, which was scientifically planned and laid down by competent engineers working together to a common end. and which was built as a whole. The conditions in France that made this possible had their genesis in the dominating sagacity and spirit of order of Louis XI. The highways and canals led up to the railway lines, and the governmental regulation and control of the old land and waterways grew naturally into the present system of railway supervision. The system of roads and waterways existing in 1830 suited the French nation exactly. They were so arranged and classified that each bore its exact proportion of importance, whether national, departmental or local. They were regulated from Paris with ease and with military precision. Never was there so efficient a corps of engineers for carrying out such a scheme as that which is trained at the *Ecole des Ponts et Chaussées.*

The first step taken by the government looking to a

general railway system was the appropriation of a sum of money to pay the government engineers for laying out a general system of railway lines covering the whole of France. When this survey was completed, and while the lines existed only on the maps and blue-prints of the engineers, the government next took up the question of ownership and management. While other countries had been acting and experimenting and making costly mistakes, France had been reasoning and thinking the matter out. There was a long series of debates in Parliament between 1837 and 1840. The plan finally adopted was the conception of Thiers, and was settled upon in 1842. The plans then and thus deliberately conceived and matured—both of engineering and of legislation—have since been carried out consistently.

They were sufficiently elastic to be practicable. It was at the outset a policy of support and control without actual ownership, or, in other words, a policy of subsidies to encourage private companies, and in return for these subsidies a reservation of more or less important rights of State control. As the work proceeded and as new conditions arose, amendments and modifications were incorporated into the plan as originally conceived. In 1842, it was strictly a plan for subsidies; in 1852, extensions of chartered privileges were granted to the companies; in 1859, a scheme for the guarantee of interest on the bonds

was inaugurated, and, in 1883, the government guarantee was extended to dividends.

Initial construction in France.

Under the plan adopted thirty-three different companies were chartered, contemplating about 2,500 miles of line. Building went on rapidly until the Revolution of 1848, and then again after the accession of Napoleon III in 1851. The lines have from the beginning been laid down with the idea of avoiding all duplication and all waste of capital; they were surveyed and traced by government engineers, and each part stood in its proper and intelligent relation to the whole. Parallel lines were forbidden as a matter of course, and competition was not conceived of as among the possibilities of the situation. By 1852 the number of independent systems had been reduced from thirty-three to eleven, and in 1859 the eleven were reduced to six, of which five radiated from Paris. Each had a monopoly in its own territory. Competition running riot, the construction of needless lines as a mere speculation in the securities, rate wars with their attendant iniquities, and the consequent wanton waste of money and effort in construction and operation are essentially unthinkable to a French railway engineer or official. New construction is undertaken only as required, and to meet the necessities for more lines growing out of the development of any particular territory.

About 1859 it became obvious that a considerable amount of new construction was necessary in order to bring the railway system up to a proper standard of utility and efficiency, and in order to secure this construction, each of the six companies, and each in its own district, undertook to construct a large number of branch lines. The government took the initiative, and in order to facilitate this new work and to secure it promptly recourse was had to a system of State guarantees of interest on the bonds upon which the money for the new construction was to be raised. This was the plan devised by De Francqueville. Money was, of course, easily raised by issues of bonds upon which the government guaranteed 4 per cent, this guarantee making the securities instantly marketable and extremely valuable. There was, accordingly, no wasteful financiering, no iniquitous jobs, no lack of funds, no foreclosures, no reorganizations, receiverships or squeezing of investors.

In 1865 a further plan was proposed in the Chamber for the construction of a net work of local roads not to belong to the six companies. and the municipal authorities were given the right to subsidize such lines. Pursuant to this plan, several thousand miles of these local lines were built throughout the country within the next five years. It was not, however, contemplated that they should be combined into systems which might interfere

in any way with the monopoly of the six companies. They were designed to be feeders. However, after the war of 1871, the prohibition to combine was successfully evaded, and these local lines by a series of combinations began to be serious competitors in many places to the main systems. This made it necessary for the government to take the matter again in hand, and the problem was ultimately solved by having the great companies take over the local lines within their territories severally, upon terms.

Recent French financiering

In 1879, by a decree of July of that year in the Chamber of Deputies, De Freycinet undertook to raise a loan of three thousand millions of francs for the construction of about 10,000 miles of additional line. This plan has been slowly carried out since that time. There was at first some delay, but by the beginning of 1884 this last comprehensive scheme of railway development was settled upon, the leading points of which were these: first, that the State hereafter should confine its own railway operations to the small district in the Southwest occupied by what is known as the State line; that isolated lines which the State owned in various parts of the country should be taken over by that one of the six great companies in whose territory it lay; second, that additional lines as needed should in future be constructed only by the companies in whose district they belong; third, that the State should guarantee each company a minimum dividend, and that when the

amount available for dividends exceeded a certain percentage—the rate differing for each line—two-thirds of the excess should go to the State. The limit, however, was placed so high that this provision has been practically inoperative. Thus, for example, on the Northern line, the guarantee minimum dividend is 13.5 per cent, while the point beyond which the State shares the excess is 22.1 per cent. In the case of the Paris, Lyons & Mediterranean, the guarantee minimum is 11 per cent, the State sharing in anything beyond 15 per cent, and so on, with slightly lower percentages for the other companies.

All of the lines in France with one exception are owned and operated by private companies. They are *concédés* and become state property upon the expiration of the concessions. Meantime they are subject to a strict governmental supervision and control. The length open for traffic on December 31, 1901, was 23,880 miles, which fully meets all the requirements of the country. The original scheme was for the government to contribute about 250,000 francs per mile; and private enterprise to find about 200,000 francs per mile, thus dividing the expense and the ownership. The concessions generally were to fall in, first in about forty and later on in ninety-nine years. When this occurs—about the middle of the present century—the government will, it is claimed, become possessed of an asset in the shape of railway property suffi-

cient in realizable value to pay off in full the national debt. In 1892 the French railways were conservatively valued at 16,000 millions of francs. The original plans of construction and joint ownership were somewhat modified as time ran on. (Théry's *Histoire des grandes compagnies des Chemins de fer français* (Paris, 1894).)

Economics of the French scheme.

In the construction of the French lines there has been less waste of capital and better results for capital than elsewhere in the world. French railways have cost less and come to more than any others on earth. It need not be argued that the French scheme put in practice would inevitably reduce the cost of construction to a minimum and would secure the best results for the least money. Passing by the matter of the State guarantee of interest and dividends, it may be said that the net earnings of the six private companies have been upon an average far beyond anything accomplished elsewhere in the world in that respect from railway operation. Furthermore, in face of the strong position of the French railways as monopolies, the government notwithstanding exercises a sufficient control—one which is in many respects admirable. No other country has in its civil service such a body of trained engineers and inspectors, and nowhere else are things done so well along these lines as in France.

French rates and service.

A comparison of the rates charged by French railways with those of other continental countries or with England

are not unfavorable to the French system. They are, speaking generally, lower than our rates in this country for passengers and higher for freight, but that is because a great majority of the passenger traffic is what we know as third class, and because there is comparatively little long-distance freight traffic. President Hadley has, however, wisely said: "The average rates per ton-mile are anything but an infallible sign concerning a railroad's wisdom or a State's prosperity." (Railroad Transportation, 202.) And nothing is more certain than that rates may be too low as well as too high, having regard both to the well-being of the carrier and to the best ultimate interests of the public served by that carrier. The monopoly does not work extortion in rates, and it does not prevent proper governmental regulation.

Coming to the quality of the service rendered, the French lines compare well with the best in other countries. Their freight and military service is not inferior to that of any other nation; and their passenger service is the fastest and most luxurious, as well as the most comfortable and satisfactory, in Europe. The greater number of experienced travelers will, I think, pronounce it, upon the whole, the first passenger service in the world. The lines out of Paris, south and north, in speed and luxury probably have no equals anywhere.

The French plan, as is seen, forces the numerous independent companies to work in harmony with one another, while giving each of them an absolute monopoly in their own territory. It renders, therefore, the process of consolidation within that territory easy and inevitable. Whatever slight attempts have been made in the Chamber to check or prevent combination or monopoly have been promptly overruled as contrary to the general scheme. This was particularly the case in 1875, when Phillippart, a Belgium capitalist, undertook to consolidate the local lines as against the six companies; and even the State itself in the operation of its own lines in the Southwest has never succeeded in breaking into the monopoly of the Orleans Company in that territory. While France prohibits effectively competition between her railway lines, she is constantly spending large sums in improving internal water communication; and private carriers using these waterways without paying any toll carry off more or less traffic from the railways, and are allowed to do so.

Summary of the French position.

To make a summary statement, we find the facts to be that in France the railway system was intelligently planned as a unit from the outset; that the lines were laid down by competent government engineers and constructed without paralleling; that in consequence very little money was wasted in construction; that competition did not enter into the scheme as originally devised, and that when it arose—

notably through the consolidations of the net work of local lines built between 1865 and 1870—it was suppressed by the government; that railway investments have been almost uniformly profitable, and upon the whole much more profitable than in other countries; that freight rates are not excessive and that passenger rates are very low; that the public is well served, the passenger service especially being of the very best; that governmental regulation is not hampered or thwarted by the strength of the railways as monopolies; that no mischief and much good seems to have come from the elimination of competition between lines, and that upon the whole the French scheme secures a maximum of adequate, efficient and satisfactory service at a minimum of cost and friction. (Picard's *Les Chemins de fer français* (Paris, 1884); Ch. Gomel on the railways of France from a historical, statistical and economic point of view, with discussions of railroads in other parts of the world, in the *Nouveau dictionnaire d'économie politique*, of Leon Say and Joseph Chailley, 10th ed., Vol. 1, (Paris, 1900).)

Ah, but some mocker will say, "it is all very well for you to talk about French railway administration, and its excellence, and all that; but all such things are contrary to our American idea of liberty—quite contrary, don't you know, to the genius of our Anglo-Saxon civilization," etc., etc. However expressed that will perhaps be some man's

thought; it often is, when it is said that "they do these things better in France." Now the short and ready answer to all such stuff is that it is imported and decadent twaddle—a phantasm fit only for boys while they are Sophomores, or for old ladies gossiping over their tea cups. It is not a man's size in this country. To talk about the "genius of our civilization"—whatever that is—as a supposable justification or palliation of haphazard and wasteful methods in the development of our railway system, or to regard "Anglo-Saxon" notions and misconceptions—whatever they may be—as in some vague and indefinable way a sound basis for a differentiation of our railway methods from those of the French is mere imbecility. It is impossible to believe that grown men in the twentieth century, confronted with a real problem, will give it a moment's consideration. The question is not whether it is Gallic or Saxon, but whether it is good or bad; not whether it is Latin, but whether it will work. If the French are in possession of any communicable sanity on railroad problems, we want the benefit of it. It is a poor enough excuse for slovenly methods that we have moved along sound "Anglo-Saxon" lines, as if there were some sanctity about mistakes because they are laid to racial defects. All such rubbishy talk is either the stupidest provincialism, or it is the intellectual refuge of men too lazy or too dull to think connectedly on these questions.

We had much better be sane than "saxon" in regulating our railways, and we may well eliminate all considerations of racial difference, so far as they are not imaginary, in looking the railway problem squarely in the face. We had better learn where and how we can, and reap as much as possible full benefit from the experience of every country on the planet where railway administration is sound and successful.

Railways in Belgium.

The policy of government ownership is perhaps best typified by the Belgian system. Of all countries in the world Belgium probably offered the best field for a State railroad. The country is small, compact and rich, the population crowded, active and intelligent, and the industries varied, all which insured a large volume of local traffic. Moreover, Belgium is on the highway between England and Germany, so that, in addition to a dense local traffic, the Belgian lines were certain to secure considerable through traffic on commodities moving between England and Germany. There was in consequence of all this little room for mistake in locating the main lines, and they were, as in France, for the most part laid down intelligently and built economically.

Railroad construction began as early as 1833. Private companies were allowed to build lines wherever the State did not choose to build, but competition between the lines

owned by private companies and the State lines was not at any time part of the original scheme. Like the French, the Belgians saw from the start that competition would be uneconomic and wasteful. The private railways increased rapidly from 200 miles in 1850 to 700 miles in 1860, and 1,400 miles in 1870. This rapid growth of the private lines was accompanied by their inevitable consolidation into systems, and in spite of the fact that competition had not been contemplated, there began in Belgium about 1856 a period of railroad war between the State and the private lines and among the private lines themselves. Theoretically, the State had and exercised the power to forbid the private companies from entering into any competition with the State lines, but, in spite of that, competition in Belgium after about 1856-57 was keen. The State had the better routes and in some sort the inside track, but some other advantages possessed by the private companies practically offset this advantage.

This competition working the usual mischief finally drove the government to the expedient of buying out the private companies. This began about 1870. By 1874, the government owned more than half the mileage of the country. By 1880, it owned two-thirds, and in 1902, there were 2,516 miles of railway in the country, all, or practically all, of which is controlled by the State, either through ownership or lease, and competition is in conse-

quence wholly eliminated. The State now owns more than 70 per cent of the total mileage, and operates almost all of the remaining 30 per cent by lease.

This is in brief the history of the development of railways in Belgium. It appears that competition was not part of the original scheme; that it nevertheless arose and ran its course; that when the State realized the disadvantage of it, steps were taken to eliminate it entirely, and that this was done by the purchase of the competitive lines. There was at first the inevitable consolidation of the private lines, eliminating competition between those lines themselves, but intensifying it as between them and the government lines. Then came the consolidation of these lines with the State-owned lines by government purchase, and competition was at an end. It is only another case of the universal tendency to combine, and of the powerlessness of government to prevent it. There is also possibly a suggestion that governments do well to facilitate the elimination of competition when and how they can.

Italian railways. In 1878, a Parliamentary commission in Italy undertook an investigation of the railway situation in that country. Testimony was taken throughout the kingdom, and an enormous mass of material collected. In 1881, this Commission made its report to the government, which was subsequently published in seven quarto volumes. It was

the most thorough railway investigation ever undertaken in the world, and the report is probably the most valuable in existence. The material parts of it have been translated into French, and are thus available. From the work of this Commission it appears that, prior to the wars which resulted in the union of the Italian States in 1870, the principal railway lines of Italy not only were disconnected and independent of each other, but also constituted isolated or strictly local systems for each of the chief independent states. Thus the lines in Tuscany, in Lombardy, and in Piedmont were wholly distinct both from one another and also from those centering in Venice, Rome and Naples. Some of the early charters had come from the Emperor of Austria and one from the Pope: the lines were inadequate to the demands of the business of the country, the service was very poor and the companies substantially bankrupt and irresponsible, but there was plenty of competition.

The problem after 1870 was to unite and consolidate these scattered and local lines into systems fit for united Italy, to construct new lines, to reconstruct old ones, to re-equip and to reconstitute; and then to operate the reconstructed lines as a whole. The range of mountains from north to south which constitutes the back-bone of the Italian peninsula dictated a natural division of territory for the amalgamated lines. There was as of course

much local jealousy to overcome. Although Italy was too poor to spend much money in experiments, there was thought to be danger to the autonomy of the new state in permitting foreign capital to come into the railways, and it was prevented by the government, so that, in consequence of all these matters and hindrances, things at first moved slowly. Connecting links were first built, which served to unite the isolated local systems, the plan being to consolidate the local parallel and competing lines rather than the connecting lines. Finally the roads fell into four systems—that of Upper Italy, that of Rome, that of the East coast, and that of Sicily and the South. Here, as elsewhere in Europe, competition between parallel lines did not enter into the scheme of construction and reconstruction, and consequently consolidation was not only inevitable but easy, and it was facilitated wherever there was duplication. Upon the division of territory between the four systems, and with the consolidation of lines within those four territories respectively and the building of the connecting links, the problem of construction was in a way to be solved; or, in other words, the lines were laid down and ready for operation.

State ownership and private operation.

Next came the problem of ultimate ownership and present maintenance and operation. Soon after 1870 the State had begun to buy up the lines, especially in the North, where there was danger from Austrian influence, and by

about 1875 a considerable part of the mileage of the kingdom was owned and operated by the State. So that by that time Italy seemed committed to what may be called the Belgian system of State ownership and operation. But Belgium was rich and Italy was poor, and it was soon found that the State was neither managing the lines well nor making any money out of it; there was, therefore, general dissatisfaction throughout the country with the railway system; neither the poorly served public nor the depleted treasury of King Victor Emmanuel was satisfied.

Result of the Italian investigation.

It was in that state of affairs that the investigation of 1878 was undertaken, the result of which was that the Italian statesmen who had the matter in hand came to the conclusion that it was not the proper function of the Italian State to run its railways; that State management in Italy had proved more costly and less satisfactory than private management, and that the carrying on of so vast an undertaking by the new State involved political risks and dangers of a serious nature. The outcome was the chartering in 1885 of three private companies, one, the Adriatic, for the territory on the east of the Apennines, a second, the Mediterranean, for the territory on the west, and a third, the Sicilian, for Sicily, the two systems in the peninsula being of about equal consequence, while the one in Sicily was, of course, smaller. A fourth company has

since been chartered to operate the lines in Sardinia. These companies were to take over the rolling stock of the lines within their respective territories at a valuation, and thus become the owners of it, and to maintain and operate the lines, dividing the gross receipts with the State on an agreed basis. So that the ultimate solution was that the State was to own the lines, while private companies were to operate them. Practically the railway business of Italy proper is in the hands of two companies, one on either side of the Apennines, the lines meeting at Naples, Rome, Florence, Milan, and elsewhere. Between 1881 and 1897 the length of the Italian railway system almost doubled itself, and in 1898, there were 9,813 miles of line open for traffic. The service is satisfactory and the railway system is making rapid progress throughout the kingdom. (Cucheval-Clarigny's *Les Chemins de fer italiens*, in *Revue des Deux Mondes*, July 1 and 15, 1884.)

Summary of the Italian position.

Thus we see that in Italy, as elsewhere, competition preceded combination; that it was found to work mischief and that attempts at combination were the inevitable result; that when the matter was taken seriously and intelligently in hand by the State, competition was eliminated by law, and the territory divided; and that then, and then only, were satisfactory results secured in railway operation. It appears, therefore, that whether we choose State operation as in Belgium or reject it as in Italy, it is the same

as far as competition and combination are concerned; that the same economic laws govern in each case, and that in the long run competition is eliminated.

Railways in Germany.

Railways in Germany grew up very much as they did in England, at first without any general plan, and without any real comprehension or appreciation of the problems involved. The Germans, however, like the English, seem to have started right on the question of competition. Their earliest statutes explicitly recognized the right to a monopoly in their first lines. The country then consisted, aside from the central Kingdom of Prussia, in large part of a number of semi-feudal principalities, and local railway systems sprang up in each of the States, which now constitute the present German Empire, so-called. Prussia followed Belgium in a general way in her early legislation and initial construction.

The first state railway in Germany was built in Prussia about 1848-50, from Berlin toward the Russian frontier. Other state lines followed, but, *pari passu*, many private lines were laid down, some of them securing some state aid, by way of guarantees or subsidies or stock subscriptions from the principal States. Some, however, even of the smallest principalities, at first owned their lines outright and operated them too. So there was at the start every sort of a railway in Germany. This haphazard and

piecemeal work begot the inevitable result—fierce competition everywhere among the private companies and between them and the State roads. The results were extremely dissatisfactory; the service was poor and the rates high.

About 1861, Bismarck came into power, and from that time dates the influence of militarism upon the railway system of Germany. It has since shaped and coloured the whole development and operation of the German lines. He saw clearly enough that the mixed and competitive system was a bad one, not only from a military point of view, but also from the point of view of the country at large. Steps were, therefore, gradually taken, in Prussia especially, to acquire the private lines and to consolidate competing and conflicting interests. The matter moved slowly because the country was poor, but the mileage nearly doubled between 1865 and 1875.

After the war with France in 1871, more rapid progress was made in unifying the railway system of the country. By 1878, there were about 3,000 miles of State-owned and operated lines; 2,000 miles of privately-owned and State-operated lines, and about 6,000 miles of privately-owned and privately-operated lines. In 1881, the government owned more than 7,000 miles of line, only about 3,000 miles remaining in the hands of private companies. In 1885, the government owned 13,000 miles of line in Prus-

sia alone, while only 1,000 miles remained in private hands. In 1900, there were 30,597 miles of railway in the German Empire, more than 93 per cent of which were owned and operated by the State. Under the present law the government is required to manage the railways "in the interest of general traffic as a single system" (Constitution of the German Empire, art. 42), and in 1886 the government issued a Code of Railway Regulation, applicable to the whole railway system of the country. (Report on Prussian Railways in the English Consular and Diplomatic Reports (London, 1902).)

Competition practically ceased in Germany by about 1875, and for the past quarter of a century the railways of the country have been operated on non-competitive lines. Pooling arrangements with the canals and other competing waterways are sanctioned, in order fully to eliminate wasteful competition and unjust discrimination. So far, therefore, as the experience of the German lines is of value to us, it confirms the views here contended for; and the history of those lines bears out entirely the statement upon which my argument is based, that wherever combination is possible competition is impossible, so that, as railways develop, territory is inevitably divided between the lines and competition thus effectually eliminated. (Mange's *L'exploitation des Chemins de fer de la Prusse depuis leur rachat par l'etat*, in *Revue des Deux Mondes*, May 1, 1893.)

Railways in Austria-Hungary.

In 1901, Austria-Hungary had 39,014 kilometers of line open for traffic. The first Austrian charter was granted in 1836, and construction went on actively thereafter until the revolution of 1848. The original idea was to follow the French system, and have the lines built and operated by private companies. Their statute of 1838, it may be noted, was the first general railroad law enacted in any country in the world. It provided for undertakings by private companies, and for guarantees by the State of interest upon the cost of construction; it limited dividends on shares to fifteen per cent, and absolutely prohibited the construction of parallel lines. It was discovered, however, as time ran on, that the French system was not well suited to the condition of things in Austria; and in spite of statutory prohibition, as the lines were constructed and put into operation, competition ran riot. There was also the usual iniquity growing out of constructing lines for a chance to speculate in the securities; and the competition of the waterways—of the Danube and the canals—although pooling between them and the railways was allowed and encouraged, added to the confusion and disorder of private management. So in 1873, Austria fell into line with the other countries of Europe, and started off in the direction of State ownership and control. In 1885, about three-quarters of the mileage in Austria was, however, still in the hands of private companies, but all the

lines in Hungary were at that time owned and operated by the State. By 1898, more than half of the Austrian lines were under State management, and the tendency sets more and more in that direction.

Russian railways.

In May, 1900, Russia (including Russia-in-Asia) had 41,400 miles of completed railway, and 8,000 miles under construction, including the great Trans-Siberian line, which is the greatest railway enterprise yet undertaken anywhere. Work began on this line in March, 1891, and it is just now opening for traffic. The estimated cost is about five hundred millions of dollars. (Gerrare's Greater Russia.) The distance all rail from Paris to Port Arthur or Vladivostok is about 7,000 miles, and it is proposed shortly to arrange a through-car service from *la Gare de l'Est* to Port Arthur and Peking. The government has furnished a large part of the capital required for construction, and owns and operates about two-thirds of the total mileage in European Russia; it has in addition subsidized and thus controls and dominates the policy of the lines owned and operated by private companies. The tendency, as elsewhere in Europe, is toward complete government ownership and operation. There is, therefore, in Russia, it will probably go without saying, no such thing as hurtful competition, and, consequently, none of the evils inciden thereto. (Guide to the Great Siberian Railway, pub-

lished by the Russian Ministry of Ways and Means of Communication (St. Peterburg, 1900); Shoemaker's Great Siberian Railway (New York, 1903).)

Railways in the minor countries of Europe.

In the smaller European countries we find the same variety in railway operation and control as in other things; but the tendency everywhere is to government ownership or to such a strict government regulation as effectually eliminates anything like competition between the lines.

Thus in Norway, in 1902, there were reported 1,203 miles of line, all now owned and operated by the government; whereas in Sweden, at the end of 1901, there were 7,217 miles of line in operation, of which only 2,392 were government lines. But although in 1893 there were reported to be not less than 108 different owners of private lines in Sweden, the law strictly and successfully prohibits competition between them, or between them and the State lines.

The last available figures for the Spanish lines show 8,607 miles open for traffic in that country, all, as in Portugal, owned by private companies, but supported and controlled by the State.

In Switzerland, where in 1899 there were 2,396 miles of line in working order, the governmental supervision has until recently been much the same as in Spain. In 1898, by popular vote, it was determined (in view of the evils

of over-construction and some hurtful competition in spite of legislative prohibition) to purchase for the government the five chief lines, thus putting Switzerland in the Belgian class of countries owning and operating their railway lines. This scheme is now being financed and carried out by the Swiss government. (Haguet's *Le rachat des Chemins de fer suisses et des conséquences* (Paris, 1902).)

The railway history of these relatively unimportant European countries is of much less interest and value to us than that of the greater States, but it discloses nothing which makes against the position here maintained. The Italian system has been followed substantially in Holland, and in Denmark and by some of the other minor Scandinavian countries.

Railways in India.

The construction of railways in India, which commenced in 1853, has been conducted on three different systems: first, the employment of companies under a system of guarantee; secondly, by the State through its own officials; and thirdly, by assisted companies either with or without guarantee or subsidy from the State, and working with capital wholly raised by themselves or partly with capital provided by the State. Out of eight lines constructed on the first system, five have been purchased by the State. Two of these are worked by companies. The more important, the East Indian line, is carried on by the

same company that constructed it in the first instance, on special terms as to the sharing of profits. The second, the South India line, is in the hands of a new company, whose capital was subscribed by the shareholders of the old one. The three remaining lines are worked by the State, and all five come into the category of State lines in the accounts of the Government of India. (Macgregor's Ways and Works in India (London, 1894).)

The total number of miles of Indian railway open for traffic on the 31st of March, 1902, was 25,529. Although construction began about the middle of the last century, the system has been developed almost entirely since what English writers on railway problems speak of as "the rise and fall in England of the great fever known as the railway mania," to which detailed reference has hereinbefore been made. The Indian railways were, therefore, planned and constructed in the light of the experience afforded by the home construction and development, and many of the cruder home blunders were thus avoided. They now fall into one or other of four classes; (a) State-owned lines, worked by companies, (b) State-owned and State-operated lines, (c) lines constructed by guaranteed companies, and (d) lines constructed by assisted companies. The English government, following the French lead in that respect, provided for a system of guarantees, by which the necessary funds were cheaply found; in laying down the lines

paralleling was avoided, and competition effectively prevented. Where there is no competition there is the less incentive for combination, and there seems not to have been any great tendency in the Indian lines to combine. India, therefore, stands negatively for the soundness of my position. (Bell's Railway Policy in India (London, 1894).)

These railways seem to be rather poor affairs; there is much complaint of indifferent service and high rates. How far these things may be chargeable to the inefficiency of the government or may be due to the system itself does not appear. They have up to the end of 1899 involved a yearly loss to the Indian revenues, but the working of the year 1900 resulted for the first time in the history of the Indian Railway system in a net gain to the State of Rs. 87,239, and in 1901 Rs. 1,154,119. From the commencement of railways in India, about half a century ago, to the end of the year 1899, the loss to the Indian revenues amounted to Rs. 57,811,487.

Whatever else may be true of the Indian lines, they have been constructed and are operated entirely on the principle of non-competition and division of territory, and there being no competition there has been little tendency to combine; in other words, the evil of competition not existing or not being allowed to exist, there is no call for combination. This is, as I have said, negative evidence in

support of the contention that wherever competition is possible combination is inevitable.

Railways in Mexico

The present railway situation in Mexico is fully disclosed in an exceedingly valuable report recently made to the government by Senor Limantour, Secretary of Finance. It purports to have been based upon a careful investigation of the facts, and is on the face of it as intelligent and comprehensive a State paper as any that has emanated in recent years from any government office anywhere in the world upon the subject. The fact that Senor Limantour, who is now virtually Prime Minister of Mexico, has been nominated by President Diaz as his successor in the presidential office suggests his high standing at home and gives weight abroad to his views on these questions. This report, which seems largely to speak the voice of the Secretary himself, deals at length with the problems of competition and combination, and discloses the fact that the policy of the Diaz administration, as now settled and determined, is to meet and solve these problems by absolute government ownership, rather than by any further futile attempts at legislative control. The government, finding that the general railway law of 1898 (from which, when it was passed—as in the case of our original Interstate Commerce law—great things seem to have been expected) was proving inadequate to the due regulation and administration

of the lines, and realizing the necessity of stronger and surer governmental control, has lately come to the policy of going into the open market and of adopting the same tactics as private individuals or companies in purchasing the shares of such lines as it desires to control. Mexico is, therefore, now fully committed to the theory of governmental ownership, if not to that of governmental operation. The government is just now offering to purchase the Vera Cruz & Pacific line, which has just been completed by American capital and lost to its original owners by the recent suspension of the Maryland Trust Company of Baltimore.

Those portions of Senor Limantour's report which disclose the processes by which the government has acquired and is acquiring such a proportion of the shares of the leading lines as will give it due preponderance in their control are very interesting. The explanations of the causes which have moved the government to this step, as contained in the report, are of an even wider interest and significance to students of the railway problem. In brief, Senor Limantour's explanation is this: The government has until recently been in the usual elementary attitude of encouraging by concessions, subsidies and otherwise all the railways which either citizens or foreigners would undertake to build and operate as private enterprises, in the supposed interest of the most rapid possible

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development of the country. It was only in 1898 that a general railway law was passed, which, however, soon proved entirely inadequate. It was, therefore, in addition found necessary to prescribe new rules relative to granting concessions for competing lines between points already connected, and to establish a Tariff Commission—something like our Interstate Commerce Commission—which was an attempt, through the agency of a governmental bureau, to prevent combinations in freight rates, and to regulate them in the public interest.

Influence of the United States.

In the light of the experience of other countries—and, as it appears, *especially in the light of the experience in the United States*—competition between the lines is by this report pronounced harmful, "except where traffic is large enough to support it"—whatever that means. Government ownership and regulation is declared to be the only real preventive or remedy against such disastrous competition—with its inevitable result of the consolidation of competing interests. It is further suggested that the fact that groups of foreign capitalists had undertaken to consolidate several of the principal lines, obliged the government to take a definite attitude lest their great railway properties should thus be taken over and controlled by alien capital. It was clearly seen that these contests for territory between the hitherto conflicting interests would eventually and inevitably result in either the forced or the

voluntary consolidation of the competing systems. The law as it stood was inadequate to prevent the acquisition in the open market by any private interest of a control of the shares of any company sought to be acquired, and there was no way to prevent the consolidation of interests through voting trusts or otherwise.

Specifically, the situation in the early part of 1902, which seemed to drive the government strongly in the direction of State ownership and control, was this: The railways of the country were found already to be in the hands of no more than four groups of capitalists, viz.: the Central, the National (having lately absorbed the International), the Interoceanic and the Mexican—all but the last showing great expansive activity. The Central especially, by the recent purchase of exclusive port concessions and the building of new lines in and out of the City of Mexico, was threatening to cripple the National line. Plainly, therefore, consolidation between it and the Central would inevitably follow in the ordinary course.

Meanwhile, through Messrs. Speyer & Co., the National was trying to acquire the control of the Interoceanic route, but this was frustrated by the government. Various circumstances favored the government as against the foreign bankers in its secret move to secure control of the Interoceanic's debentures. "The ability and high financial standing," says the report, "of the firm representing the

interests of the Mexican National constituted a serious obstacle to the attainment of our aims, and it was necessary to act as we did with decision, rapidity and absolute secrecy." A proposition for a common exploitation by the government in association with the National, the International and the Interoceanic companies followed; "but it was soon recognized that such an arrangement could not have the necessary durability nor afford the indispensable conditions whereby the companies might secure themselves definitely against the hostility of other corporations to which they might be exposed in time." The government thereupon, wisely declining to be drawn into any partnership arrangement with the companies, reverted to its original plan, namely, an arrangement such as would give the State primary and absolute control of the three systems, and in such a way as to protect each of them against such future competition as would be sure to arise under the existing state of things.

State acquisition and control proposed.

The report declares that the government has now determined to grant no concessions hereafter for competing parallel lines, except in territories where dividends can be earned by each such line. Several voting trusts, in some of which the government has had an interest, have existed in Mexico, but some of these have lately been dissolved upon the advice of American counsel.

It was at first proposed that the government should exercise control of the new consolidated system through the voting trust of the National, already in existence. But, "according to the valued opinion of American attorneys, who are specialists in affairs of this nature, it would have been attended with many objections of a legal character, and have proved a fruitful source of litigation." Accordingly, the consent of its three members was obtained, and the voting trust dissolved, an agreement being entered into with Messrs. Speyer & Co. whereby they were to secure for the government 40 per cent or more of the voting shares. The report then enters into a detailed account of the steps by which this was successfully accomplished, 47¼ per cent of the shares being thus secured. It also goes fully into the question of the probable earnings of the consolidated railways and of the issuance of treasury notes for $12,500,000, American gold, to pay for them.

The advantages to the government, growing out of the control of the new consolidated system, is summarized in the report as follows:

"1. The having obtained by one stroke the control of the lines belonging to the National and International without losing control of the Interoceanic.

2. Having secured a considerable reduction in the total cost of the operation; and

3. The ability to effect payments in such manner as in no wise to disturb the equilibrium of the budget, and out of funds which in the long run will be recovered by the State."

Experience in the United States controlling.

Repeated reference is made throughout the report to the railway situation in the United States, and it is obvious that *our experience has strongly influenced* the Mexican government in its new departure in the direction of State ownership. *They have learned our lesson before we have learned it ourselves;* and, now that Mexico has come into line with the rest of the world in its attitude upon the question of railway competition and combination, the United States stands alone among the greater commercial countries of the earth in continued persistence in the futile attempt to secure competition between railway lines and to prevent combination and the consequent division of territory; and it leaves us upon the general questions involved and upon the larger issues of the railway problem, solitary and alone, the most backward nation in Christendom or out of it,—distanced in the matter not only by all the greater countries of Europe, but even by Egypt, Japan and Chili, and, for the matter of that, by Zulu Land and Zanzibar.

From a return prepared by the French Ministry of Public Works and published in *Le Journal Officiel* of May 25, 1902 (from which many of the figures throughout this

brief have been taken), it appears that there were in Mexico in 1870 no more than 349 kilometers of line; that in 1880 there were only 1,120 kilometers, while in 1890 there were 9,713 kilometers, and in 1900 a total of 15,454 kilometers of railway in operation—now, as we have seen, all substantially under government control or presently to pass thereunder, as the result of the investigation and comparison of the advantages of private versus government ownership and operation set forth in Senor Limantour's report.

The Australian lines.

In Australia, State ownership and control has since about 1860 been absolute and universal. The latest available statistics show 12,926.75 miles of line open, viz.: In New South Wales (June 30, 1902), 3,025.75 miles; in Victoria (June 30, 1901), 3,221 miles; in South Australia (June 30, 1901), 1,736 miles; in Queensland (June 30, 1900), 2,801 miles; and in West Australia, 2,143 miles, by the last report. While there was at first some construction by private companies, every mile is now State railway. The English learned their lesson at home, and when it came to the building and financing of colonial railways, they profited, after a little initial blundering, by their home experience. So that all the later Australian lines have been well and cheaply built, and have become, especially since the legislation of 1884, strictly non-competitive by law.

New Zealand lines.

In New Zealand, in March, 1902, there were reported 2,235 miles of State railway, and 88 miles of private lines. The figures intimate that there is no serious competition there.

South American lines.

In South America the governments generally own the lines. In Brazil, in 1897, there were 9,072 miles of line open and 3,500 miles in course of construction. Of this mileage the State actually owns but a small part, but it subsidizes the rest, and thus exercises an efficient control over all, which effectually prevents duplication and competition. In the Argentine there were reported in 1901 about 10,259 miles of road, mostly government lines. Chili in 1902 reported about 3,000 miles open, of which 1,458 belong to the State. (Castro's South American Railways (Monte Video, 1893).)

French and British African lines.

The French possessions and dependencies in North Africa reported, in 1900, a railway system amounting to 4,628 kilometers in length, as against 3,595 in 1890, and 517 in 1870; British South Africa seems to have had, in 1900, nearly 6,000 kilometers of lines in operation. There were about 2,000 kilometers of line open in the Transvaal at the commencement of the Boer war, and about 400 kilometers in the Congo in 1900. The total length of all operated lines in Africa, including the foregoing, the Egyptian lines and some little development in Portuguese

East Africa, amounted in 1900 to 18,467 kilos, substantially all of which is government line. Competition and combination are, therefore, not open questions in Africa. The several European countries that have built the lines there either operate them directly or see to their operation on a strictly non-competitive basis.

Chinese railways.

No useful deductions can be drawn from the lines in China. About 1,000 miles were open in 1902, aside from the Trans-Siberian line. These lines have been constructed by British, French, Franco-Belgian and German companies, and are so far isolated and insignificant that the question of competition cannot yet have been a serious one. The concessions have, however, not contemplated competition or duplication. An ambitious scheme of construction has been outlined, which will be many years in working out.

Japanese railways.

Japan in 1900 reported 2,806 miles of private line, and 833 miles owned and operated by the State. The government lines are worked at a profit. The roads are of three classes, "State," "Prefecture" and "Village" lines, all maintained wholly or in part at the expense of the government, and subject to complete governmental control. It is proposed in future that all the new lines shall be built and owned by the government.

Egyptian lines. In Egypt there were reported as of January 1, 1901, about 2,063 miles of completed line, 1,403 miles of which are in the Delta of the Nile, and 660 in upper Egypt. Of the total mileage all the standard gauge line, amounting to 1,393 miles, is owned and operated by the State. About 670 miles of light agricultural line are owned by private companies, but are operated without competition with the government lines.

Historical summary. From the foregoing general view of railway history and development throughout the world, it appears—and it is, moreover, a matter of common knowledge—that there is, as matter of fact, a universal and irresistible tendency in competitive railways in the same territory to combine and to divide the territory between them; that attempts by legislation or litigation to prevent it have uniformly failed; that States which at first recognized and sought to enforce the principle of competition between railways have one after another ultimately abandoned the attempt; that nowhere on the earth, except in the United States, is the principle of competition now recognized or still sought to be enforced; that railways in new countries or colonies of old countries, constructed during the last quarter of a century in the light of the experience of the older countries as to competition, have been constructed and operated

from the start on non-competitive lines; that the amalgamation of parallel and competing lines is entirely consistent with good service, reasonable rates and adequate governmental supervision and control; that where railways compete there is always an enormous waste of capital and effort and frequently poor service and high rates; that the tendency everywhere is to eliminate competition where any measure of it still exists; that government ownership is good or bad according to the point of view; that there is a strong tendency in Europe, and elsewhere except here and in England, toward government ownership and operation; that the governments of Europe, with ten times the police power of our own, have long since abandoned all attempts to hinder and thwart the laws of trade and commerce by restrictive legislation, or to prevent the inevitable in railway development; that, instead of opposing this economic evolution, the most enlightened European governments have on the contrary legalized it, and seek to enforce and regulate it in the public interest; that the best and cheapest service is secured where competition is impossible, and where the State puts the emphasis of its effort, not on interference with railway finance, but on securing good service at fair rates.

II.

Being thus universal and inevitable these amalgamations operating as divisions of territory cannot be contrary to public policy, and it is open to this Court so to determine on this appeal.

To avoid misapprehension I ought to say preliminarily that no argument is here contemplated which will put in issue the expediency or wisdom of the Act of July 2, 1890, known as the Sherman Act; nor is the Court at all to be asked to pass upon the justice or policy of that statute, nor to find it unconstitutional upon its alleged contrariety to public policy. It is conceded that all such considerations in respect of this statute address themselves primarily to the Congress, that such questions in this case concern the legislature exclusively, and that with them this Court has, therefore, now nothing to do.

What I seek to do is to draw the attention of the court to the history of railway development as affecting the subject matter of this litigation; and what I have in mind is an argument on the equity of the statute drawn from an historical consideration of the constitutional questions of public policy involved, arising out of the demonstrable inevitability of railway consolidations and mergers throughout the world—considerations particularly fit to be urged upon this Court in such a case as this, and proper to control its decision.

Public policy as a rule of construction.

It is quite true that when the legislature speaks, public policy becomes whatever the statute enacts; but it is equally true that every statute may still be a subject of judicial construction, and that it is always open to the Court, as between two or more possible constructions, to adopt that one which speaks the language of right reason and which is most consonant in such a case as this with those circumstances and conditions which affect the matter throughout the world. To argue that the construction placed upon a statute makes it contrary to public policy is quite another thing than to argue the unconstitutionality of the statute on grounds of public policy. It is not here contended that the act is unconstitutional.

On the contrary my contention is: first, that this aggregation or amalgamation of rail lines in the same territory, being universal and inevitable in the normal growth and development of railways, cannot be contrary to public policy; and, second, that upon this appeal it is competent for this Court by a fair construction of the statute so to adjudge and determine.

Of a form or phase of railway development which is world-wide contrariety to public policy cannot be alleged. In the very nature of things it cannot be contrary to an enlightened public policy; and any statute which flies in the face of universality and inevitability, if open to construction, calls loudly for construction. Just as, for

example, we cannot legally predicate nuisance of what is authorized by statute, however distasteful the thing itself may seem to be, so we cannot predicate contrariety to public policy of that which is universal, whatever the plausibility of arguments in the abstract against it, or however much it may seem to come within the formal language of some prohibitory statute. The inevitability and universality of a thing—of such a thing as this—is its sufficient warrant from the standpoint of public policy. Public policy is the policy or general purpose and spirit of the law. We sometimes call it the policy of the law. So also public policy is convention; it is, therefore, of the very essence of public policy that whatever is, is right.

The function of the courts; People v. Hawkins, 157 N. Y. 1.

When we speak of public policy we mean the law of the State, and that law is to be found in the Constitution, the statutes and the judicial decisions. (*People* v. *Hawkins*, 157 N. Y. 1, 12.) It has these three sources, and under our system equally these three. It is as much the proper function of the Court, when a case arises, as of the legislature or of a constitutional convention, to declare the public policy of the State. A written constitution defines the public policy of a people along general lines; a statute is a declaration in writing of that public policy in a particular matter; a judicial decision in a given case operates on each of them by way of construction, and thus declares or defines a rule of public policy by interpretation.

Considerations of public policy, when urged to the Court in such a matter as this, are, therefore, in a broad sense constitutional considerations. The federal constitution itself was when adopted nothing more than a reduction to writing of some of the established principles of public policy which then made up the constitution of the more civilized European states, especially of England, and that is all that it is now. So, also, when we speak of "the British Constitution" we mean nothing but the body or the sum total of the unwritten principles of public policy which prevail for the time being in that country; and our own federal constitution is nothing more than a statement in writing of some of the principles of public policy which prevail here. The word "Constitution," as we use it in the United States, is a collective name for the principles of public policy on which our government is based, the fundamental or organic law reduced to writing. In England a constitutional question is involved every time a question of public policy is raised. There it is a matter of the declaration and interpretation of an unwritten law; while in this country our constitutional questions have to do with the interpretation and construction of a written law in the light of the public policy of the time.

Constitutional considerations.

If this be a sound view, it follows that statesmanship is not confined to the legislative branch of a representative

Judicial statesmanship.

government. It inheres oftentimes to the long robe as well; so that, as has just been said, it is, on occasion, for the bench to define and delimit public policy by the right construction of constitutions and statutes—by judicial pronouncement—just as really as for the legislative department of the government to prescribe it by formal enactment. It is the function of the court to construe, and by construction to declare. (*People* v. *Hawkins*, 157 N. Y. 1, 13-15.)

People v. Hawkins, 157 N. Y. 1.

That has been very much the case in this court in every period of its history. Our Constitution, as much as the English or the French or any other, is the gradual development of our political sense and intelligence. The thing doesn't stagnate, it grows. Writing it down on a sheet of paper an hundred and twelve or fifteen years ago didn't paralyze our intelligence or lay an embargo upon our thinking. So that the question here and now is, not what was public policy an hundred or fifty or thirteen years ago, but what is the public policy as of to-day—and for this Court, what is the most enlightened present public policy —which is now to control in the construction of this statute in this particular case. This notion is well expressed by Lord Watson in a comparatively recent case in the House of Lords:

Nordenfelt v. Maxim - Nordenfelt Guns, etc., Co., (1894) App. Cas. 535.

"A series of decisions based upon grounds of public policy, however eminent the judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal. The course of policy pursued by any country in relation to and for promoting the interests of its commerce must, as time advances and its commerce thrives, undergo change and development from various causes *which are altogether independent of the action of its courts.* In England, at least, it is beyond the jurisdiction of her tribunals *to mould and stereotype national policy.* Their function, when a case like the present is brought before them, is, in my opinion, not necessarily to accept what was held to be the rule of policy a hundred or a hundred and fifty years ago, but *to ascertain, with as near an approach to accuracy as circumstances permit, what is the rule of policy for the then present time.* When that rule has been ascertained, it becomes their duty to refuse to give effect to a private contract which violates the rule, and would, if judicially enforced, prove injurious to the community." (*Nordenfelt v. Maxim-Nordenfelt Guns & Ammunition Co.*, (1894) App. Cas. 535, 553, 554.)

III.

These railway combinations have not in the past been and cannot in the future be at all prevented by adverse legislation or judicial decision.

The English Parlimentary Committee, to whose investigation and report reference has hitherto been made in the court of this argument, sum up their view upon the effect of hostile or prohibitory legislation on this subject as follows: "A long and varied experience has fully demonstrated the fact that, while Parliament may hinder and thwart it, it cannot prevent it." The theory of the British Constitution is that Parliament is omnipotent, and here there is formal admission by Parliament itself, based upon the fullest investigation, that there are things that omnipotence cannot do. That was a full generation ago, and now, for more than thirty years past, things have gone on in England on that understanding. No serious attempts, since the time of that investigation and that report, have been made to prevent or even to "hinder and thwart" railway consolidation in that country.

Chatham and Southeastern amalgamation.

Within the last five years the notable consolidation of the London, Chatham & Dover and the London & South-Eastern lines has been effected, which operates to merge two theretofore independent parallel and competing lines

and to allot the whole southeastern section of England to the amalgamated company. This, as is usual in that country, was accomplished through special Parliamentary powers, which in this case were sought and obtained without arousing any great opposition, engendering any considerable heat, or provoking any declamation about a sacrifice of the rights of the public. In point of fact, nothing but good seems to have flowed from it.

Previous to 1899 both these railways had achieved an unenviable notoriety for the inadequacy, slowness, and unpunctuality of their services, for the dilapidated condition of their stations and rolling stock, and generally for the backward state of their accommodation. In the case of the Chatham Company the financial position was also precarious, and though the South-Eastern at one time was nominally much stronger in this respect, it too had lost much ground in the preceding five years, and for 1901 its ordinary dividend at the rate of only 2 per cent was the worst in its history. Competition of the worst kind between the South-Eastern and Chatham Companies was a normal state of affairs, and as the result both railways spent vast sums of capital and revenue for which there is at the present time little to show except duplicate lines and stations, and inadequate provision for traffic where extended accommodation was most required. Many times a fusion of interests had been urged upon the two com-

panies, but without result. Negotiations for amalgamation were entered upon several times, but they always broke down at the crucial moment.

Parliamentary powers.

At last, in 1898, an agreement between the two companies was come to, not for a complete amalgamation, but for the pooling of gross revenue and working expenses and the division of net profits on a fixed percentage basis, with additional arrangements for the joint contribution of capital required. It was not the intention of the two companies to seek Parliamentary authority for this arrangement, as they were not bound to secure the sanction of any other body than their shareholders. But the government virtually intimated that the new arrangement was so important and far-reaching in its bearing on the interests of the public, that the terms of agreement ought to be embodied in a bill. This bill was introduced in Parliament in the session of 1899, and received the royal assent on the 1st of August following, and seven months thereafter the new arrangement actually came into operation.

The preamble to the "Working Union Act" of 1899 recites that

> "With a view to avoiding undue competition and unnecessary expense and delays and other inconveniences arising from diversity of interests and to turning to the best account the respective powers and resources of the two companies * * * it is

> expedient and will be for the public advantage that, subject to the provisions and enactments in this Act contained, the undertakings of the two companies should be used, worked, managed, maintained, and improved from and after the passing of this Act, as one undertaking * * *."

The Act constituted a Managing Committee to administer the two railways as one company, that new body being made up of the directors of the two companies. (Stevens' Investment and Speculation in British Railways, 158-160.)

In its practical effect this amalgamation is in many respects not unlike that worked out for the Great Northern Railway and the Northern Pacific Railway through the Northern Securities Company.

These questions settled in England.

The ease with which this latest English amalgamation has been accomplished suggests that in that country these questions are now forever settled and at rest along sound economic lines. It is true that a short time ago, under the spur of local prejudice, and moved thereto by rather a panicky national conceit, the English government departed for a moment from its traditional *laisser faire* on this subject, and made a boyish and entirely futile effort to prevent the recent International Steamship combination —all which further demonstrates that whether government acts or whether it forbears it is the same. In either case

the amalgamation is effected and accomplished, and in neither case is the action of the government controlling. With the government and without it alike these consolidations go on. If they come to grief, and when they come to grief, it is from the play of natural causes, and not because of legislative or judicial action.

This "merger" a *fait accompli.*

The substantial unification of these two transcontinental railway lines—the Great Northern and the Northern Pacific—which is in question in this litigation, has been accomplished; the "merger" complained of is a *fait accompli;* it is something done and settled. What has been thus joined the law cannot put asunder. It may compel a change of the form of union; it cannot alter the fact of union. The hands of the clock do not go backward, and this amalgamation, it may be respectfully urged even at this bar, is now beyond the reach of courts and statutes. Unless this particular matter is something beyond and outside of the laws of railway development which are found to obtain universally, unless this case is an exception to an invariable rule, and unless we can do what has not been done elsewhere on the earth, this working union between these two lines of railway will ultimately prevail over any legislation which attempts its destruction. In the construction of such statutes it is for courts to do what they can, and not try to do what they can't.

The mandate of the Court in this case, it goes without saying, will—whatever it may be—be scrupulously obeyed by every party to the cause. It is our way in this country to bow to the law. But the thing itself will go on and subsist. A judicial decision may "hinder and thwart it, but it cannot prevent it." Such a decision may disturb and disarrange and postpone; it may work temporary injury, it cannot work ultimate destruction. All history demonstrates the absolute truth of this assertion.

The existence of every consolidated railway system in the United States bears further testimony to the truth of this proposition. It is absolutely and literally true that every one of these amalgamations has been created in the face of the very strongest legislative and judicial opposition possible to be brought against it. The statute books of every state in the Union across which the lines of one of those great consolidated companies run bristle with enactments against the combination of parallel and competing lines. Absolute prohibition is the universal law of statute and decision alike; penalties are imposed, fines and confiscations threatened, sometimes in constitutions, sometimes in statutes, and sometimes in judicial decisions. But in spite of all this, the practical outcome has been everywhere the same. A bare mention of the States of New York, Pennsylvania, Texas, the six New England States taken as one, the territory southwest of St. Louis, and the

State of California, and the most cursory consideration of the railway situation in those territories, severally illustrates to a demonstration the truth of all that is here claimed—the entire futility of attempts to prevent by statute and judicial decision what in the nature of things cannot thus be prevented.

Of all this the Court will so far take at least a *quasi* judicial notice, that I shall not go State by State and system by system into detail. It might be done if it were necessary in order to get the view I seek to present fully before the Court; and it could be done to the clearest mathematical demonstration if it were proper, but it would far exceed the limits of any brief that ever was written.

Legislative and judicial opposition ineffective.

No truth was ever any truer than this, and it needs only to be stated. Railway consolidations in the United States have gone on and been made effective in face of all the opposition, legislative and judicial, that could be brought against them. This opposition, like that in England, has perhaps at times somewhat "hindered and thwarted" them, but it has not "prevented" them. It is difficult then to see what useful purpose the opposition has served; it has not been successful, and thus seems to have been misdirected and wasted effort. Where it has caused expense and trouble to the parties concerned it has been something worse. If it have operated merely to impede economic advancement, to hamper development and to throw

blocks under the wheels of human progress, it was worse than a crime, it was a blunder. Prohibitory and preventive statutes of this sort, both here and abroad, together with the judicial decisions which attempt to enforce them, have become in only some few years after the fact obsolete. The world moves on and quite away from them, and in total disregard of them; and presently they are treated by one of the taxidermists and find shelf-room as legal curios or mere antiques in the cabinets of collectors of judicial and legislative curiosities. The statute books and the report-books are full of such legal mummies.

We have found it so in every part of the world.

IV.

Any statute which opposes itself to such a trend or tendency in railway development is economically unsound. Such unsoundness is not to be presumed of any general federal statute; and when one construction of such a statute puts it in opposition to such trend or tendency, while another, equally open to the court, puts it in harmony therewith, the Court is remitted to the latter construction.

That such a statute, if it squarely and unmistakably opposes itself to this tendency of railways in the same territory to combine, would be unsound from an economic

point of view, follows from the fact that statutes rightly conceived declare public policy and do not attempt to thwart or hinder irresistible forces in economics, and do not attempt to stay what is inevitable. It is not arguable that railway combination is *mala in se*, and, therefore, it is not to be pretended that such consolidations, like rape or murder and the like, are outbreaks of original sin to be held in check as much as may be by the strong arm. No time, therefore, need be wasted over that. In consideration of what has gone before in this argument, I shall assume at this point that it need not be further insisted that statutes of this character which fly in the face of gravitation and the inevitable are unsound and impolitic.

Such unsoundness and impolity is not to be presumed of any general federal statute. (Cooley's Const. Limit. (6th ed.), pp. 218, 219.) There is every presumption that the Congress acted wisely and judiciously in passing the act, and that it proceeded to this legislation in the full light of all the facts hereinbefore set out. Considerations of public policy in such a case as this being constitutional considerations, if the statute in question be open to a construction which will bring it into harmony with constitutional principles and intendments, it is the right and the duty of this Court so to construe it. The rule of construction for which I here contend is one heretofore frequently announced and approved by this Court.

In *Grenada County Supervisors* v. *Brogden*, (112 U. S. 261, 268) the Court says:

Grenada County Supervisors v. Brogden, (112 U. S. 261.)

"It certainly cannot be said that a different construction is required by the obvious import of the words of the statute. But if there were room for two constructions, both equally obvious and reasonable, the Court must, in deference to the legislature of the state, assume that it did not overlook the provisions of the constitution, and designed the act of 1871 to take effect. Our duty, therefore, is to adopt that construction which, without doing violence to the fair meaning of the words used, brings the statute into harmony with the provisions of the constitution. Cooley Const. Limit., 184, 185; *Newland* v. *Marsh*, 19 Ill. 384; *People* v. *Supervisors*, 17 N. Y. 241; *Colwell* v. *May*, 4 C. E. Green, 249. And such is the rule recognized by the supreme court of Mississippi in *Marshall* v. *Grimes*, 41 Miss. 27, 31, in which it was said: 'General words in the act should not be so construed as to give an effect to it beyond the legislative power, and thereby render the act unconstitutional. But, if possible, a construction should be given to it that will render it free from constitutional objection; and the presumption must be that the legislature intended to

grant such rights as are legitimately within its power.' Again, in *Sykes* v. *Mayor*, 55 Miss. 115, 143: 'It ought never to be assumed that the law-making department of the government intended to usurp or assume power prohibited to it. And such construction (if the words will admit of it) ought to be put on its legislation as will make it consistent with the supreme law.'"

Hawaii v. Mankichi, (190 U. S. 197.)

In the case of *Hawaii* v. *Mankichi* (190 U. S. 197, 212) the same rule is declared and enforced, and the following language from the opinion of Mr. Justice Brown is, it is submitted, peculiarly applicable to the case at bar:

> "Without going back to the famous case of the drawing of blood in the streets of Bologna, the books are full of authorities to the effect that the intention of the law-making power will prevail, even against the letter of the statute, or, as tersely expressed by Mr. Justice Swayne in *Smythe* v. *Fiske*, 23 Wall. 374, 380, 23 L. Ed. 47, 49: 'A thing may be within the letter of a statute and not within its meaning, and within its meaning, though not within its letter. The intention of the lawmaker is the law.' A parallel expression is found in the opinion of Mr. Chief Justice Thompson of the supreme court of the state of New York (subsequently Mr. Justice

Thompson of this court), in *People* v. *Utica Ins. Co.*, 15 Johns, 358, 381, 8 Am. Dec. 243: 'A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers.'

"Without going farther, numerous illustrations of this maxim are found in the reports of our own court. Nowhere is the doctrine more broadly stated than in *United States* v. *Kirby*, 7 Wall. 482, 19 L. Ed. 278, in which an act of Congress, providing that if 'any person shall knowingly and willfully obstruct or retard the passage of the mail, or of any driver or carrier,' was held not to apply to a state officer who held a warrant of arrest against a carrier for murder, the Court observing that no officer of the United States was placed by his position above responsibility to the legal tribunals of the country, and to the ordinary processes for his arrest and detention when accused of felony. 'All laws,' said the Court, 'should receive a sensible construction. *General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to*

its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter.' A case was cited from Plowden, holding that a statute which punished a prisoner as a felon who broke prison did not extend to a prisoner who broke out when the prison was on fire, 'for he is not to be hanged because he would not stay to be burned.' Similar language to that in *Kirby's Case* was used in *Carlisle* v. *United States*, 16 Wall, 147, 153, 21 L. Ed. 426, 429.

"In *Atkins* v. *Fibre Disintegrating Co.*, 18 Wall. 272, 21 L. Ed. 841, it was held that a suit *in personam* in admiralty was not a 'civil suit' within the 11th section of the judiciary act, though clearly a civil suit in the general sense of that phrase, and as used in other sections of the same act. See, also, *Re Louisville Underwriters*, 134 U. S. 488, 33 L. Ed. 991, 10 Sup. Ct. Rep. 587. So in *Heydenfeldt* v. *Daney Gold & Silver Min. Co.*, 93 U. S. 634, 638, 23 L. Ed. 995, 996, it was said by Mr. Justice Davis: 'If a literal interpretation of any part of it (a statute) would operate unjustly, *or lead to absurd results*, or be contrary to the evident meaning of the act taken as a whole, it should be rejected. There is no better way of discovering its true meaning, when expressions in it are rendered ambiguous by their connec-

tion with other clauses, than by considering the necessity for it, and the causes which induced its enactment.' To the same effect are the *Church of Holy Trinity* v. *United States*, 143 U. S. 457, 36 L. Ed. 226, 12 Sup. Ct. Rep. 511, in which many cases are cited and reviewed, and *Lau Ow Bew.* v. *United States*, 144 U. S. 47, 59. In this latter case it was held that a statute requiring the permission of the Chinese government, and the identification of 'every Chinese person other than a laborer, who may be entitled by said treaty or this act (of Congress) to come within the United States,' did not apply to 'Chinese merchants already domiciled in the United States, who, having left the country for temporary purposes, *animo revertendi*, seek to re-enter it on their return to their business and their homes.' Said the Chief Justice: 'Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, *and, if possible, so as to avoid an unjust or an absurd conclusion.*'

"Two recent English cases are instructive in this connection: In *Plumstead Board of Works* v. *Spackman*, L. R. 13 Q. B. Div. 878, 887, it was said by the Master of Rolls, afterwards Lord Esher: 'If there are no means of avoiding such an interpreta-

tion of the statute' (as will amount to a great hardship), 'a judge must come to the conclusion that the legislature by inadvertence has committed an act of legislative injustice; but, to my mind, a judge ought to struggle with all the intellect that he has, and with all the vigor of mind that he has, against such an interpretation of an act of Parliament; and *unless he is forced to come to a contrary conclusion, he ought to assume that it is impossible that the legislature could have so intended.*' See, also, *Ex parte Walton*, L. R. 17 Ch. Div. 746."

When a statute is unambiguous, and incapable or insusceptible of more than one construction—that is to say, when there is nothing to construe, and only one possible meaning to the language used—it is for the Court to enforce it without regard to the wisdom or unwisdom, the polity or impolity, of the statute as legislation. But whenever a statute is open to construction it is the duty of the Court to construe it; and when it is open to two constructions, it is for such a court as this to construe it in the light of all the circumstances and conditions involved, in the light of right reason, and so as to make it run in harmony with constitutional principles—implied as well as express, equitable as well as strict—if it can in any way be done without doing violence to the meaning of the words.

In the light of Mr. Justice White's dissenting opinion in *United States* v. *Trans-Missouri Freight Association*, (166 U. S. 290, 343), it is respectfully submitted that the statute in question comes within this rule and is certainly susceptible of two constructions. That opinion suggests that it is possible for judicial minds to take contrary views as to the proper force and meaning of this statute, as well as upon the general questions at issue. To the same point may be cited the decision of Lochren, J., in *State of Minnesota* v. *Northern Securities Co.*, (123 Fed. Rep. 692.)

U S. v. Trans-Mo. Asso., (166 U. S. 290.)

Minn. v Nor Sec. Co., (123 Fed. Rep. 692.)

It may here be pointed out that this statute is not unconstitutional—in the equitable sense in which that term is used in this argument—unless the Court construe unconstitutionality into it. To affirm the decision in this case would be the same thing in fact as to declare the statute inoperative and void, because that would be to put a construction on it which would render it ineffective, inoperative and void. It would set it to do an impossible task, to stay something which cannot be stayed, and that is judicial absurdity, to be avoided whenever possible on the authority of the cases above referred to.

While statutes are not to be tested by the courts by any mere rule of public policy, and thus be made to stand or fall solely on that ground, it is still true, leaving constitutional limitations for the moment out of view, that the construction of a statute is properly so tested; and that wher-

ever any statute is open to two constructions it is proper to urge considerations of public policy in favor of one construction and against the other, which considerations may properly be controlling.

When a court is called upon to declare a statute unconstitutional—using that word now strictly—it goes to the farthest verge of construction to sustain it. By analogy it ought in this case, being confronted with the situation as it is, to adopt any shift to avoid a construction which makes the statute a practical nullity, or which makes it equitably unconstitutional and involves judicial absurdity. (Cooley's Const. Limit. (6th Ed.), 216, 217.)

In the phrase of Lord Esher, "a judge ought to struggle with all the intellect that he has, and with all the vigor of mind that he has, against such an interpretation." (*Plumstead Board of Works* v. *Spackman*, L. R. 13, Q. B. Div. 878, 887.)

Plumstead Bd. of Works v. Spackman, L. R. 13, Q. B. Div. 878.

As between two constructions of this statute which are equally open to it, we ask that the court shall choose that one which is consonant along broad lines with the most enlightened modern public policy, and reject the one which drives it into the predicament of declaring contrary to public policy as matter of law, something which is demonstrably not contrary to public policy as matter of fact —which is perhaps only another way of asking the court not to render a decision herein which will be a *brutum*

fulmen in fact, however sound it may seem to be as mere matter of law.

"Innocuous desuetude."

Moreover, this particular statute, as now construed and sought to be enforced, is dead and past galvanizing back to life, at this late day, by any amount of judicial decision. As legislation it is in its present shape as dead as the Fugitive-slave law. Let us see. It is legislation levelled at combinations in restraint of trade; it has been the law of the land for more than thirteen years; it has been invoked repeatedly in the course of litigation against what are popularly known as "trusts"; as now construed it has never yet destroyed a single such combination nor prevented the creation of one. Let us get at the exact truth. In July, 1890, when the act was passed, there were in the United States about an even dozen "trusts." Now, after more than thirteen years every one of these original trusts still exists, and more than one hundred others have been created in the meantime—more than an hundred by actual count. The statute, therefore, has not had any tendency to check the promotion and organization of trusts. So far, therefore, it has in practice proved valueless. It forbids something in terms which it has not the slightest tendency to prevent. From that point of view it is, therefore, a fatuous enactment. Such statutes tend to bring the law into discredit if not contempt with plain people.

But this is only one feature of the subject. It may be said—although that does not at all meet the difficulty in this case—that no statute is self-enforcing; and that it is not conclusive merely to say that a law is not obeyed. Let us proceed then to a consideration of the cases in which an enforcement of the statute has been attempted in the courts. A careful examination of every reported case in which the act has been sued upon discloses the fact that it has proved of not the slightest use in efforts to destroy "trusts." An official list of such cases, put out by the Department of Justice, comes down nearly to the end of the year 1902, and subsequent search has brought it quite down to the moment of putting this brief to press. All the cases have been examined. In a considerable majority of the cases where suit has been brought under the act the plaintiff has been defeated; in a few of them some relief has been obtained against combinations of laboring men; some of the cases have been substantially a draw; and in every one of the remaining cases—being all the cases where anything substantial has been accomplished by the litigation—it is found that the injury complained of was illegal at common law, and that the plaintiff would have recovered just as well without the statute as with it. The statute, therefore, when invoked in the courts, has proved to be utterly valueless.

Official list of decisions to end of 1902.

It is not exaggeration or intemperance to say of such a statute that it is as dead as the laws of Carthage, and that judicial decisions that have attempted or may in future attempt to put the breath of life into it will in no long time take rank with the Dred-Scott decision. They will form no part of the living body of law for us in these United States. So far as the statute has had the semblance of life hitherto, so far as it has seemed to move and have a being in our legal system, it has been only a disturbing element; it has perhaps thwarted and hindered a little, but it has not prevented the economic evolution of our business affairs. Its pseudo-activity has been mere agitation, and these agitations have—to take a phrase from one of Macaulay's Essays—"resembled the grinnings and writhings of a galvanized corpse, not the struggles of an athletic man."

As was written to the angel of the apocalyptic church in Sardis, so it may be said of this statute: "Thou hast a name that thou livest, and art dead." If, therefore, the Act of July 2, 1890 (26 Stat. at Large, 209), is hereafter to serve any useful purpose as a living law, it is high time for courts that are called upon to construe it, to "be watchful and strengthen the things which remain, that are ready to die"—lest presently it be like Lazarus after he had lain in the grave four days. From another point of view it is very much like Sir Thomas Lipton, who, having sev-

eral times failed to carry off the Cup, is now advised by his more judicious friends to desist, before his efforts become a laughing stock. It was probably laudable in him to try; it will be wise for him to stop before "all men begin to mock, and say this man began to build and was not able to finish."

The impeachment of the statute.

This statute, therefore, as now construed, stands impeached at the bar of this court as an anachronism, as a mere interference with trade and commerce, and as useless and out of touch with the modern trend of human industry. The contention that the validity and lawfulness of contracts or combinations in restraint of trade as forbidden by a statute in this country and in this year of grace do not depend upon any consideration of reasonableness or unreasonableness in the restraint is anomalous, anachronical and absurd. It has about it the old clatter of the rack and chains; and such a statute is as really unenforceable among a free people—and it ought to be—as a statute which should now attempt to punish witchcraft or poaching with death. The manifest reasonableness of this view seems to commend it to all men who take an intelligent view of the past, appreciate the significance of the present and exercise a scientific imagination with regard to the future.

> "The tendency of modern thought and decisions has been no longer to uphold in its strictness the doctrine which formerly prevailed respecting agree-

ments in restraint of trade. The severity with which such agreements were treated in the beginning has relaxed more and more *by exceptions and qualifications*, and a gradual change has taken place, brought about by the growth of industrial activities, and the enlargement of commercial facilities which tend to render such agreements less dangerous, because monopolies are less easy of accomplishment." (Beach's Modern Law of Contracts, sec. 1569; quoted and approved by Mr. Justice White and referred to by him as a statement of "the modern and American rule on the subject," in *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 347, 348.)

Individualism v. Collectivism.

The warfare that the politicians and the people are now waging in this country against what they call "trusts," is a phase of the eternal struggle between Individualism and Collectivism—a struggle common to almost every nation at some period of its history. Fortunately for the race, the battle is generally fought out and won once for all, and the individual ultimately finds his proper place in an organized community. Unless the State disintegrates that is the only and inevitable solution. Wherever in any age or country Individualism makes the fight so as to render Collectivism impossible, there follows a gradual blight of public spirit, a slow deterioration of national character, a

sapping of energy and a sure progression toward final national extinction. This is exceptionally and strikingly illustrated in the history of the republic of Florence—a short, sad history in spite of its brilliant artistic and literary successes, as well as its financial and military triumphs. Whether one takes a dramatic or a scientific interest in the story—whether it is tragedy or comedy to the reader—it points the same moral, a moral instructive both of itself and by comparison, and one fit to be recalled in the consideration of the material and practical questions which this litigation involves. Florentine Individualism, the statecraft of Machiavelli and the personalism of the Medici and other great families made Collectivism impossible in Florence, and Florence fell. At the very time when this was going on in Tuscany the Collectivism of Louis XI. and of Edward III. was laying foundation for the strength of modern France and England, so that in our day Florence, with all her splendid achievement in art and letters, in finance and government, is little more than a faded vision, while France and Britain, that builded better than the Tuscan, have preserved the continuity of their existence as independent States and stand erect and virile in the forefront of human progress. So equally of every other modern state where the battle has been fought out and won in the same way. We are in no danger in this country of losing the fight for a conservative Collec-

tivism, and all this is for us merely academic, but the possibilities of evil for us if we should fail in the fight, may well give radicals pause.

It will not, I hope, be regarded improper to argue this case in this way on grounds of public policy, inasmuch as the Court, in the opinion in the case of the *United States* v. *Trans-Missouri Freight Association*, (166 U. S. 290), based their decision as it seems, to some extent at least, on such grounds. At page 340, Mr. Justice Peckham says:

U. S. v. Trans-Mo. Asso., (166 U. S. 290.)

> "We are asked to read into the act, by way of judicial legislation, an exception that is not placed there by the law-making branch of the government, and this is to be done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed congress intended the natural import of the language it used. This we cannot and ought not to do. That impolicy is not so clear, nor are the reasons for the exception so potent as to permit us to interpolate an exception into the language of the act, and to thus materially alter its meaning and effect. It may be that the policy evidenced by the passage of the act itself will, if carried out, result in disaster to the roads, and in a failure to secure the advantages sought from such legislation. Whether that will be the result or not we do not know and cannot predict. These con-

siderations are, however, not for us. If the act ought to read as contended for by defendants, congress is the body to amend it, and not this Court, by a process of judicial legislation wholly unjustifiable. Large numbers do not agree that the view taken by defendants is sound or true in substance, and congress may, and very probably did, share in that belief in passing the act. The public policy of the government is to be found in its statutes, and, when they have not directly spoken, then in the decision of the courts and the constant practice of the government officials; but when the law-making power speaks upon a particular subject, over which it has constitutional power to legislate, public policy in such a case is what the statute enacts. If the law prohibit any contract or combination in restraint of trade or commerce, a contract or combination made in violation of such law is void, whatever may have been theretofore decided by the courts to have been the public policy of the country on that subject."

CONCLUSION.

It is respectfully submitted that grounds are here urged to the court which lay a foundation for such a modification of the views above expressed as will justify a distinction

of this case from the *Trans-Missouri Freight Association* case, to the extent of an adjudication upon this appeal, that, in the case of railway combinations such as the one at bar, either that the Statute is not applicable, or if it be applicable, that not all restraint of trade, but only unlawful, unreasonable or injurious restraint is here within its proper purview. Such a decision in this case will put the statute in harmony with the actual conditions surrounding the growth and development of American railways, and will harmonize our attitude with that of England and of France and of other countries where these questions have earlier arisen and where they have been settled along the lines for which I here contend. With such an interpretation, brought fairly into line with modern conditions, and made to square with the eternal verities, this statute may still have life and may yet serve a useful purpose in our *corpus juris*. If given a practicable construction it may be enforced and so may cease to be a dead letter.

It is not now necessary that we should go to the full length of absolute Government ownership and operation; but, if the experience of all the rest of mankind is good for anything, it is necessary, in order to put ourselves in line with the best theory and practice, that like France and England we completely eliminate the disturbing element of competition between our privately-owned and operated lines, that we legalize consolidation and division of ter-

ritory as the rest of the world has done, and put the emphasis of our future effort on regulation, rather than on repression, on securing good service at fair rates, and on relieving the railway companies of the incubus and oppression of mere governmental intermeddling with their financial operations. This will put us in line with the rest of the world.

I hope it may seem to the court that, in the presentation of the historical statement upon which this argument is based, I have taken the case in this aspect of it out of that class of cases wherein arguments from considerations of public policy fail by reason of the necessary vagueness and uncertainty of the rule of public policy invoked. This I insist is not the case here. It is not the case considered by Jessel, M. R., in *Besant* v. *Wood*, (12 Chan. Div. 605, 620) where he properly argues that in that case, and in all such cases, public policy is very much a matter of individual opinion, and, therefore, not a safe guide. But in that case with his usual incision and preciseness of view the Master of the Rolls declares that public policy is convention and that it is a growth, so that what was yesterday public policy is not necessarily so to-day, and that what many excellent people think "very horrible and against public policy" at one time may come to be regarded by everybody as confessedly sound and sensible at a later time. There are no two sides to the specific

Besant v. Wood, (12 Chan. Div. 605.)

questions of public policy here invoked as affecting and determining the decision of this case.

I haven't looked much into the report-books to see whether all these propositions square with the decided cases, or whether decisions in point are to be found proper to be cited in the usual way in their support. My argument is in a sense, *Cui bono?* I haven't cited many authorities; perhaps there are none. I have tried to present a practical view, somewhat extra-legal perhaps, but not for that reason the less worthy of being taken into account in the decision of such a case as this, if what I have suggested turn out to have the only merit claimed for it; namely, that of presenting a plain man's view of the economic side of the question. I have passed by the law and the solemnities of legal discussion, and have treated the facts. It is as who should say, with Emerson, "Give me health and a day and I will make the pomp of emperors ridiculous," because I have felt that, in dealing with these world-wide economic questions, this august tribunal would upon this appeal look past the precedents and beyond the preachments of lawyers and law courts, in order to deal at first-hand and directly with the naked verities of the situation.

Cui bono?

Respectfully submitted,

Charles F. Beach, Jun.

RECENT AND PENDING "TRUST" LEGISLATION AND LITIGATION IN THE UNITED STATES.

ADDRESS

BY

CHARLES F. BEACH, Jun.,

AT THE

UNIVERSITY OF MINNESOTA,

FEBRUARY 13, 1903.

ST. PAUL,
1903.

ADDRESS
OF
CHARLES F. BEACH, JUN.

Mr. President and Gentlemen of the University:

At the present moment nothing within the range of the modern science of Economics is accorded by the American public such general attention and concern as what we properly or improperly call "trusts." This is not only so now, it has been so for more than a dozen years past. In fact, now for near half a generation of men, we, the people of the United States, have been exciting ourselves about aggregations of capital. For all these years very many of us have talked glibly and some of us have thought seriously upon the subject. We began about the year 1889, or a little earlier—on the crest of a wave of general national prosperity—to believe or to affect to believe that our growing and crystallizing monied-capital, instead of being a blessing and a benefit, was a public menace. As our trade and commerce was then seen to be outgrowing its swaddling clothes, and to be taking on the form and magnitude of maturity, the people took fright, or pretended to take fright; and instead of seeing in the creation of these greater financial enterprises, the building up of fiscal buttresses that were to enable us as a nation to rise out of the category of provinces and into the larger rank of world-powers, the people scented a public peril afar off. The great trading, manufacturing and carrying companies and combinations, then forming, instead of being regarded as matters of congratulation and public felicitation—something to be fostered and encouraged by wise laws and the most enlightened public opinion—were by the unthinking majority of the people set down with sweeping generalization as something to be feared, something to be curtailed and emasculated, to be cramped and crippled, in the public interest, by all such restrictive and re-

pressive legislation and litigation as could be devised against them.

Consequently, upon that crude theory and working from the bottom upward, the people addressed themselves, by the mouth of their press and by the hand of their law courts and of their legislatures, to the task of neutralizing and undoing as much as possible what the intelligence, enterprise, capital and skill of the commercial community was devising for the increase and development of our resources along the lines of modern methods in trade and commerce. This course the people have resolutely pursued for all these years, and are still pursuing. The American people, speaking by the voice of the American politician, seem to be of substantially one mind upon this question—not to build Rome but to destroy Carthage. The public machinery is employed without stint to this end; laws galore have been written into our statute books, and countless lawsuits have been pressed and prosecuted all to the same end. The legislative powers and the judicial enginery alike are worked at high pressure every business day in the year at the high behest of the American people for the undoing of the American trust. We went in for it long years ago, and we are still hard at it.

It may now be wise to stop for a moment to take our bearings—as a mariner would say, to take the sun, or a trader, to take stock—in order that we may see what it is all about, to ascertain accurately what we have done and how far we have progressed, what the present status is and what the fair prospect for the future. If we shall seem to have been right in all this wordy warfare, we shall build ourselves up in the faith and edify one another by the retrospect; if it transpire that we have been blindly wrong, the review may give some of us salutary pause.

We mean, popularly speaking, by "trusts," all combinations of capital larger than those with which we have long

been familiar in business partnerships and in the ordinary mercantile, manufacturing and carrying companies. If this speech had been made at the beginning of the Nineteenth instead of at the beginning of the Twentieth century, the subject, instead of being Trusts—because then there were no trusts and very little capital in the United States —would have been "Corporations, a menace to the commonwealth." Then the people believed that the creation and growth of corporations threatened their undoing, just as now the same sort of people affect to believe that trusts are working to the same end. In view of what mercantile, manufacturing and transportation companies have, during the past half century, accomplished for the material development of our country and for the world at large, it may be useful to recall for a moment the early popular notions concerning them, and the honest belief that many sober people entertained a century ago that they were fraught with all sorts of possible financial and economic evil.

It will be good for us to reflect how Mr. Burr, in his effort to obtain from the legislature of the state of New York a charter for a bank, was compelled, in order to procure the passage of his bill at Albany, to charter his new bank ostensibly as a water company, calling it the Manhattan Company, giving it broadly the power of furnishing water to the city of New York, and conferring upon it banking powers, as it were, incidentally. So it comes to pass that the directors of the present Bank of the Manhattan Company in Wall street are, in compliance with the provisions of this compromise charter, elected every year in a little room in Bowery, which is maintained as the office of the bank as a pseudo water company. For some reason or another, now hard for us to comprehend, it was in those days supposed that corporations having banking powers would be especially pernicious, and the greatest

hostility was at that time manifested towards incorporations of this character.

Accordingly, no longer ago than about the year 1840, and thus easily within the memory of men now living, in the charter of the Bowery Savings Bank it was specifically stipulated by the legislature of the state of New York, as a condition of granting the charter, that the deposits of that bank should not at any time exceed five hundred thousand dollars, and that the real and personal estate of the bank should never exceed the annual value of five thousand dollars. The deviltry the bank might be up to if its deposits were allowed to exceed half a million of dollars the fathers regarded as a sound reason for this condition in the charter, and they took no chances in the matter of allowing the bank to acquire realty—possibly for the reason that land in North America at that time was very scarce. But, be that as it may, on the first of January of the present year, in spite of all this astonishing legislation, the assets of this great bank reached and now somewhat exceed eighty-eight millions of dollars; it now has one hundred and forty thousand depositors; in sixty years it has received on deposit more than three hundred millions of dollars; it has opened more than nine hundred thousand accounts; it has paid out in dividends nearly seventy millions of dollars, and the value of its real estate in the city of New York exceeds three hundred thousand dollars; in face of all this the people of the state of New York are still, by the Grace of God, free and independent. By the latest report of the Comptroller of the Currency we are further informed that there are in the United States at present more than one thousand savings banks, with nearly seven millions of depositors and nearly three thousand millions of dollars on deposit. What would the rural solons who cautiously chartered the Bowery Savings Bank have thought of that!

So, too, we recall that hostility to banking corporations less than a hundred years ago was an issue sufficient for the platform of a political party; that the champions of the second bank of the United States in the days of President Jackson were not strong enough to save it, and that the political fortunes of Senators of the United States were made and unmade according to their views upon this momentous question. In November, 1829, when the struggle in Congress over the re-charter of the bank was raging, Jackson wrote to Nicholas Biddle, then president of the bank, as follows:

> "I think it right to be perfectly frank with you. I do not think that the power of Congress extends to charter a bank out of the ten-mile square. I do not dislike your bank any more than all banks. But ever since I read the history of the 'South Sea Bubble' I have been afraid of banks."

And it was upon this key that under the hand of that masterful man the legislation of the period proceeded. The bank which had been exceptionally useful in restoring order to the finances of the young republic was sacrificed to the insane idea that banks meant mischief. All this was only about seventy-three years ago. Now we have our national banking system with all its benefits to the commercial community; and now, within the space of a human lifetime, the folly, the imbecility, the fathomless idiocy of the prejudice against the institution of banks stands confessed; nobody now has the intellectual hardihood to attempt the slightest justification or even excuse for it, and yet then it possessed many of the best people, and everybody short of the very best people. Then Jackson was reading about the South Sea Bubble, and spelt out of what he read that banks would never do; now people read rubbish in old English books about "monopolies" and conclude that trusts are to be the end of us. A century ago the good people of the country were having the

same sort of spasms over the creation of corporations and especially of banks that we are now having over trusts and combinations. Sometimes reflection upon the facts of history helps one to keep sane. People in general are afraid of what they are not used to, but accept as of course what they see every day. Thus, to speak profanely, the public is in some sort like a pair of half-broken colts, that shy at an automobile or a road-engine, but are not afraid of a load of hay or a boy on a sled. Accordingly, we now take banks—even big banks—down at a gulp; but have as yet no stomach for "mergers."

We may note at this point that the public are now exercised and excited about trusts without smarting under any specific injury actually and presently attributable to them, because the impression is abroad that trusts are in some way or another doing or are about to do a public mischief. Senator Hoar has just said that "as yet there has been only alarm and apprehension, without serious injury." It is significant that these fears in regard to combinations and incorporations are peculiarly insular. They are English to the back-bone; it is John Bull every inch of it. We find on the continent comparatively little of this dread of association. The unit of power in ancient Europe in time of war was the Roman Legion, and in the later times of peace in modern Europe business and commercial guilds or corporations are its natural successors. But in insular England there has always been a strong dread of what was called "monopoly." *Now, in point of fact, a monopoly is not necessarily an evil, it may be a great good.* Let us get that well into our heads. The monopolies to which we are accustomed do not affright us—do not even seem to be monopolies, such, for example, as governmental monopolies, the monopolies of the post office, of patents, of trade-marks, and of copyrights, monopolies of gas and water and electric lighting companies, of telegraph and tele-

phone companies, and of railway and street car lines, *within the limits to which we have grown accustomed.*

While Lord Coke in England was croaking out his mediæval nonsense in the law courts against monopolies, Queen Elizabeth, under the better advice of Burleigh and Bacon, was issuing patents to those great companies which strengthened her throne and added infinitely to the wealth and resources of her Kingdom. So, too, at a later day, when the throne of William III. trembled to its foundation, he chartered the Bank of England, the greatest monopoly at that time in that country. Thereby he insured to his house a permanent supremacy and laid the foundation for the modern financial strength of the Kingdom. By that act he at once steadied himself in the saddle, and at the same time built the clearing house of half the world in Threadneedle street. So that, verily, the throne and the commercial consequence of England were founded directly upon the monopolies of Elizabeth and William. The other side of the picture is Lord Kenyon's vituperative charge to a jury upon the trial of a poor fellow found guilty in an English court of the atrocious crime of buying thirty quarters of oats and of endeavoring to sell them again in open market at a profit of two shillings per quarter; and Lord Eldon's rubbishy talk about a very primitive combination in the London market to control the sale of certain kinds of fruit as a "conspiracy against the world at large."

It is, moreover, distinctly a mistake to assume that modern trusts and combinations are in any essential sense the successors or in any wise near of kin to the old monopolies which the people of England thought that they dreaded. It is a mischievous confusion of ideas to regard as "trusts" such things as the mediæval guilds, the famous Copper Syndicate, Conrad Roth's sixteenth-century corner in pepper at Augsburg, the Dutch, French and English East In-

dies companies, and the numerous middle-age monopolies of which these are in some sort types. Inasmuch as such combinations of capital as we understand by the term trusts are from a legal point of view absolutely new contrivances, the legal questions which their creation and existence raise are entirely open ones, and are to be determined for us here and now, not by reference to ancient English statutes and the reading of what Bentham contemptuously called "the report books," but rather on general considerations of equity, expediency, utility and public policy. It seems to me, therefore, that the strictly legal arguments attempted to be made against trusts have been in the main aside from the point really at issue. The old statutes against regrating and kindred acts, and the old common law notions thereabout, did not have to do with any such mischiefs as their citation in a latter-day anti-trust argument assumes. Neither are decisions of thirty or seventy-five or three hundred years ago available for such an argument except by way of a distinctly strained analogy. What Lord Coke or Lord Kenyon thought about "conspiracies" was never of much value at any time, and is certainly of no value now in fixing the legal status of modern trusts.

Very many causes may be assigned for the present development of the present day combinations of capital. It is perhaps trite to say that the modern trust, like the earlier corporation, is grounded in a commercial tendency, which grows out of a commercial necessity. Under primitive conditions every man was able to do his own business by himself and for himself; as his business grew he got a partner, and so created a partnership; later on corporations were formed, and now, when the ordinary corporations are in some sense conceived to be inadequate, we resort to a still larger, more refined and more complicated organization of capital. It is a natural and inevitable evolution.

It is perhaps not unfair to say, on such a rostrum as this, that chief among the causes to be assigned for the present development of trusts is the recent communistic trend in the legislation in this country affecting corporations, or, as one might say, aimed at corporations, by both the state and the federal legislatures, making it more and more difficult to form them, subjecting them more and more to governmental intermeddling and interference, under the guise of visitation and control, increasing their taxation and decreasing their earning power, and checking and hampering them in every thinkable way in the free transaction of their business. This has done much to induce the formation of such other and further combinations as seem to its owners likely to relieve capital from what they regard unjust and injurious restrictions, not imposed upon the whole body of the people in respect to their business, but which it is unfortunately the tendency of our modern legislation to impose upon corporations. Every winter every legislature in the country, including the Federal Congress, taxes its ingenuity to devise some new scheme for harassing corporations, and in so far as trusts seem to promise relief from such inquisitorial and pestiferous legislation in matters of trade and commerce, we may believe that we have one cause for their general favor with capitalists. Trusts seem, therefore, in some sort to be defensive contrivances.

But the prime cause for the formation of trusts is the decline in the commercial profit. Merchants, manufacturers, importers and traders and common carriers by sea and land are more and more confronted, in virtue of the conditions under which business is done in this country, with *the problem of the vanishing profit.* During the past five and twenty years selling prices and in consequence the margin of profit in almost every sort of business has been reduced from 16 2-3 to 50 per cent, and it has become in

many lines of human activity a real problem whether or not business can hereafter be transacted at all under existing conditions at a profit. Every considerable merchant knows that for many years past in many lines of business in the United States concert of action has been absolutely necessary in order to make the business possible. As prices decline and profits diminish the commercial community casts about for such means of relief as will enable business to be conducted at once safely and at a living profit at the going prices.

The slightest reflection enables the most unthinking man among us to understand that when two men employ themselves in doing what one man can do alone, there is a waste of energy, for which, unless it vanish in the air, at last the consumer of the product of those laborers, or somebody else, must, in some way or another, pay. If this supererogatory service, or any part of it, be paid for in money or money's worth, then the waste, *quoad hoc*, is charged to the consumer. But if the service be wholly or partially lost, then it comes, to the extent of the loss, out of the wear and tear and nerve force of the laborer who performed it, or else it is distributed around along the entire class. In any event there is a waste for which somebody must pay in full, and whereby the public is by just so much the poorer. If it be true that the trust idea tends substantially to check this waste of competition, that would seem to be a point in its favor. It may well be doubted—of course it is doubted—that unrestrained competition is a public benefit. "I do not think," said Judge Gray of the Court of Appeals of New York, in a recent decision (*Leslie* v. *Lorillard*, 110 N. Y. 519, 534), "that competition is invariably a public benefaction; for it may be carried on to such a degree as to become a general evil." To this dictum many wise men will instantly assent. It is not hard to see that the unification of an industry may give

rise to such economies in the conduct of the business as will constitute a considerable profit without any increase in the selling price of the commodity, and so, as soon as the trust idea was conceived, almost every business capable of taking advantage of it made haste to do so.

Something may not unfairly be said about the influence of the labor organizations in the same direction. If labor be organized—as very properly it may be—in its own interest and against capital, it is not unnatural that capital should be organized against labor, and there we find another reason for the formation of trusts. A potent factor undoubtedly in inducing these combinations at the outset was the similar combinations or trusts of laboring men, and the concerted attempt on the part of labor to dictate, for itself and in its own interest, in respect to many details of the business. The employer finds himself sometimes between the devil and the deep sea, between all sorts of embarrassments incident to competition with insolvent rivals and a bear market on the one hand and the labor organizations on the other. He thinks he is obliged to pay too much for his labor and obliged to take too little for his product. It may also possibly be true that the attitude of a certain sort of politicians and the truckling tone of a certain portion of the press have contributed something towards organizing capital, and forcing capitalists to protect themselves on their part as laboring men are doing upon theirs.

Trusts, moreover, are one of the penalties of a surplus; they are the plague of our prosperity; one of the results of our over-production and of our abundant wealth. When we were poor we were not perplexed in this way; beggars do not form trusts; but now we seem to have passed the stage where competition is a universal good, and find ourselves in a condition of trade and commerce where in many lines a monopoly is both a necessity and an advantage. The Associated Press is a familiar instance of a real mo-

nopoly but an unquestioned public convenience and benefit, which few reasonable human beings in this country would willingly be without. So, also, of the telegraph companies, the traction companies, the gas and water companies, and the various governmental monopolies, like the post office and the money order service.

However much any of us may deplore the presence and growth of these great combinations of capital, and however much it may be apprehended in any quarter that they may work a public injury, we must face the fact that they are inevitable. *They are one of the by-products of universal peace.* Intelligent men throughout the world are for the most part now busy in creating great commercial unions for the conservation and increase of material wealth, instead of equipping armies and building navies to destroy it. These combinations, too, are upon us in a flood like the tides; a manifestation in business of the same tendency of things in this generation which has elsewhere and otherwise shown itself in many directions, as, for example, in the creation of the German state out of a score of half feudal principalities; in the union and consolidation of our connecting railways into trunk lines; in the postal union; in the agitation for imperialism in our already overgrown republic; and in the fight for an international copyright. It is the same evolution, the same centripetal force that a century ago gave us our federal union of states, against the gravitating power of which, forty years ago, the great armies of the Confederacy marched to defeat. It is a trend or tendency in business in these last days against the gathering and growing momentum of which frontier legislation and the small arts of the politician of the baser sort are as certain to be futile as an act of Parliament to stay the precession of the equinoxes.

These combinations seem not only to be inevitable under present conditions in this country, but under modern con-

ditions they seem to have in them as little of the element of mischief as possible; so that they may be said to be as nearly harmless from an economic point of view as any great engines of any sort set in motion in any direction are likely to be. It is not a fair argument against anything merely to say that it is strong, and that power may be abused. That is a truism, and does not go to the root of the matter. We must either, as it appears, destroy our prosperity or now take it in this form. No one who thinks at all can seriously think that in this country of abounding resources, limitless capital and boundless energy, intelligence and enterprise, any sort of business can be made unduly profitable by any set of men or by any sort of a trust, by an iniquitous increase in the selling price of the commodity produced, without provoking competition and calling other people into the same field of enterprise. This is so much in the nature of things and along lines of common experience that I need not argue it. For the same reason that famines, once a frequent occurrence, are now in any civilized country as nearly impossible as anything can well be—because, where there is a temporary deficiency in any of the necessities of life the overflow from other lands rushes in and supplies the want, and under modern conditions of communication and transportation such speedy interchange is possible, within a few days or hours, that there can never long be any serious lack in any quarter of anything necessary to preserve human life —for that same reason, I say, trusts, except possibly as they may be bolstered up by a protective tariff, can never long corner any modern market in such a way as to make seriously against the public interest. These industrial combinations live and survive only as they serve the public as well as or better than their competitors. Their selfish interest and the public good thus lie along the same lines.

Nothing is so certain as that the profit in any line of busi-

ness can never be raised, by increase of price to the consumer, beyond a normal amount, for any length of time, without tempting the cupidity of men in other lines and creating at once an outside competition. Thus no combination of manufacturers, not protected by government patents, by a tariff or by an inequitable arrangement with the railways, can, by never so strong a pact between themselves, prevent any other set of men from going into their business whenever the general conditions of the trade promise more than an average profit. No truth is any truer than this, and it makes an end of the objection that trusts in these United States and in this day are or can ever be "monopolies" in any mischievous way. People who are opposing trusts merely upon the score of monopoly may profitably consider this proposition seriously, and try their hand a little at its defenses. Whenever, if ever, profit grows excessive by reason of an increase of selling price, or a greater demand, outside capital will come in or the trust will disintegrate.

He is a somewhat credulous man, therefore, who can keep his countenance and insist upon this line of argument in opposition to trusts, because it is precisely at this point that the public safety is assured. The trust, even though it secure what no trust has ever secured—a complete unification of a given business—contains within itself the elements of dissolution the moment it ceases to serve the public by furnishing its product at a price as low or somewhat below that at which outside capital can profitably compete. Every one of the existing trusts has the competition of outside dealers, and it has also the menace of other and new competition unless the selling price of its product be kept so low as to deter outsiders from embarking in its business. It not only must meet the competition that is, but must also forestall the competition that may be. Ex-Speaker Reed, in the North American Re-

view for December last—just before his untimely death, well said:

> "The fact is that every business man now knows that the only monopoly anybody can get, except the temporary one of patents, to which no one objects, is by producing some article cheaper and selling it cheaper than any other maker. Whether such a monopoly is obnoxious and to be stamped out I leave to the wise determination of the friends of the people."

While the outside public is complaining that the trust is its undoing, because it is a monopoly and because it sells its product too high, the competitors of the trust are screaming out that the trust sells its commodity so low that it is impossible to carry on competing enterprises. And there you are. This is well illustrated, for example, by the complaint that is made of the Standard Oil Company on the one hand by the general public, and on the other hand by other and independent oil refiners; and it suggests how little there really is in the complaints from either source. If these complaints mean anything, they mean that the public is well served, which makes an end of the general criticism.

We have, therefore, this paradox: The same selfish motive that prompts the individual dealer to charge the highest price moves the trust to charge the lowest. The individual charges all his customers will pay, the trust charges all it can—without provoking competition. In each case all that the traffic, regarded from the selfish standpoint of the seller, will bear is charged. The same self-interest which makes the price charged by the individual as high as possible makes that charged by the trust as low as possible, the same selfishness working in the two cases this opposite result. The trust fears competition more than the individual operator does, because the elimination of competition is its *raison d'etre*. The trust en-

larges the margin of profit at the bottom by cheapening production, rather than at the top by increasing selling prices. It cannot, with safety to itself, raise the price to the consumer to a point where other capital will be tempted to embark in its business; that is, to a point beyond the normal profit; but it can by new economies in manufacture cheapen without limit the first cost of its production, and thus enlarge its gains within the four walls of its own factory without openly inviting competition. Here, therefore, the self-interest of the trust works benefit to the public. It keeps present selling prices low; as, for example, the selling price of petroleum and sugar, and it stimulates economies in production, which must eventually inure to the benefit of the public. Trust economies tend ever to become public economies. When the trust has once cheapened the production of a thing, somehow in a free country the business gets away from it, and the public in the end reaps what it has not sown. Schemes for realizing inordinate profits for the trusts or for any one else will not forever stay put.

A very striking illustration of the truth of this proposition is found in what about ten years ago attracted widespread attention as the "Reading Railroad anthracite coal combination," which, when formed, seemed to many minds to be a very vicious sort of trust. The facts in point are briefly these: At that time the anthracite coal carrying companies were charging an open rate of one dollar and eighty cents per ton on coal from the mines in Pennsylvania to tide-water at and about New York, with a contract rate to the independent producers of fifty per cent of the tide-water prices. Mr. McLeod, the then president of the Reading Railroad and the soul of the combination, in order to "corral" the business of competing railroads for the combination, offered a contract rate to the independent producers of forty per cent of the price at tide-

water; this was a reduction of twenty per cent in tolls (the average contract rate having theretofore been something less than two dollars) which amounted to about forty cents per ton, and it was a reduction which the combination could well afford to make, if the Reading Railroad and its allies could carry out their plan and thereby substantially control the anthracite coal business of the country. The Pennsylvania Railroad, which was not in the combination, met this cut by making an open rate of one dollar and forty-four cents, and announcing that for the future its tolls would likewise be laid upon the basis of forty per cent of the tide-water prices. So things ran on. In the fullness of time, as we know, Mr. McLeod's bubble burst; the Reading coal trust fell to pieces, and the several anthracite carriers again began to act as independently as ever. But—mark it well—the old conditions as to tolls could not be quite restored; the fifty per cent contract rate had received a blow at the hands of the trust from which it could not recover. So that, upon the collapse of the combination, the anthracite carriers by agreement fixed upon one dollar and forty-five cents as the open rate to tide-water, and forty per cent of tide-water prices as the contract rate, thus making the reduced trust tolls the basis of their rates. This thirty-five or forty cents per ton, lost to the carrier and saved for somebody, was the direct result of the reduction in tolls made by Mr. McLeod, and is to be credited directly to the trust. This reduction, upon the assumption that about one-third of the total production of the Pennsylvania anthracite coal fields goes to market at tide-water, thus takes from the railways as common carriers not far from six millions of dollars per annum, and divides it between the producers and the consumers of anthracite coal. As between the producer and consumer, any merchant will bear me out in the statement that the consumer will in the end get more than half of this saving; so that this

Reading trust, instead of working a public mischief, either in its life or in its death, was the efficient cause of saving some three or four millions of dollars annually to the consumers of anthracite coal—that is to say, to the public—on the Atlantic sea-board. And that saving was not for that year only, but for all years, because railway people know only too well that the hands on the dial seldom go backward, and that freight rates tend ever downward. This is only one of many instances which might be adduced, and it well illustrates the truth of my proposition that trust economies somehow inevitably and ultimately inure to the benefit of the public.

Every trust in these times of diversified production and wanton plenty must face the fact that its product, whatever it may be, is not an indispensable commodity. The public can get on without it unless it comes at a reasonable price, and they will get on without it more and more in proportion as it is expensive. If we can't have one kind of breakfast-food cheap we can have another. It is in this view of the matter that the whole seventy or eighty millions of the consuming public are pitted against any trust which unduly raises its prices; thus every trust has for its competitors, first, outside dealers in its own or some similar product; second, rivals who will come in if the business is made too profitable; third, the three-quarters of a hundred millions of free Americans who will not use its product, whatever it may be, except at a reasonable price. This effectually draws the fangs of the most rapacious trust.

We are confronted, when considering the matter of commercial profits in connection with these combinations, with such questions as these: Have men a moral right to do business at a profit? Is the public morally entitled to the benefits of such economies in the production by private enterprise of a given article as accrue from the accumula-

tion of capital and the concentration of interest in its manufacture? Are the promoters of a trust entitled to such profits as they can secure by reason of the economies incident to the trust? Is it morally wrong, by concerted action among manufacturers, to prevent the production of more sugar, or oil, or strawboard, or what not, than can be sold at a profit? Have the public a right to insist upon over-production, so that manufactured products must be sold at a loss? Is one man morally entitled to the advantage of another man's foresight and economy in the conduct of his private business? Is not a fair price for a thing morally better than a low price for it? Is not a certain price for a thing economically better than a fluctuating and uncertain price? Do the politicians really believe that competition unchecked and over-production unrestrained, with the low prices, the inadequate and intermittent wages, the glut of markets, and the sacrifice of energy incident thereto, will better the condition of that class whose rights they especially champion? Is anybody so credulous as to believe that trusts of capital can be legislated or litigated out of existence, while trusts of labor continue? None of these questions need be answered, but some of them seem to answer themselves.

It will not now be pretended that it has been the tendency of any of the successful trusts to raise unduly the price of their products. On the contrary, trust prices have in general declined. Thus, for example, when petroleum was first used as an illuminating oil, it sold for a dollar a gallon. Now a much higher grade of refined oil is sold for less than ten cents a gallon, and the Standard Oil people handle it at times at a profit of one-eighth of a cent a gallon—a margin that would ruin any small concern. The same thing is true in general of other manufacturing combinations, as well as of the telegraph monopoly and of the rates of the consolidated trunk lines of railway. If the

corner groceryman were obliged to do his business upon the margin of profit per cent earned by the larger trusts, he would be speedily bankrupt. Nor need it be argued that trusts, like other commercial enterprises, are entitled to share in such general prosperity as has come to all of us, in trade and out of it, in the good times with which our country is at present favored. If there has been a general rise in prices all along the line, and in wages for all sorts of labor, no fair man will complain if it shall transpire that the prices of trust commodities have also advanced. They are certain to obey the general laws of trade, and to rise and fall with the economic tides.

Inasmuch as, according to the returns of the last census, the total value of the output of all the manufacturing trusts in the country was only about twelve per cent of the total output of all our manufacturing concerns for the census year—or about one-eighth of the whole amount of manufactured goods—there is as yet no very serious reason for apprehension that the trusts are at once to absorb all our industries, and so to have us, as the phrase popularly is, at their mercy. And it is only fair to suggest here that if the prices of trust-made or trust-handled goods in this country had advanced in recent years in the proportion that the wages for unskilled and half-skilled labor have been advanced, there would be the very strongest grounds for protest. Nothing is so well paid for with us as manual labor, and nothing has felt the stimulus of good times so much as the labor market. No greedy trust magnate has been able to force up the price of what he has to sell as much as the laboring man has been able to increase his pay in these busy and prosperous times.

To what extent, if at all, trade ought to be interfered with, or competition either facilitated or prevented by courts and statutes, or how far trade may lawfully be restrained or prevented by private contract, involves at bot-

tom elementary questions of public policy. We are to understand, as of course, that the word "trade" in this connection means much more than barter and sale, or even merchandising in the broadest acceptation of that term; and must include, when we consider legislation or litigation affecting it, not only the dealing of merchants, but the business of railroading, insurance and manufacture, and, indeed, not attempting now to speak with scientific accuracy, the greater part of all the contractual relations between man and man in a civilized community. This will include statutes regulating the practice of medicine, and of law; statutes of patent and copyright; usury laws; Sunday laws; laws regulating the sale of intoxicating liquors at retail; laws regulating the operation of mines; laws against champerty and maintenance; taxation of commerce, and particularly, in this country, of interstate commerce; "drummers'" taxes; laws attempting to regulate dealings in futures, forbidding wager policies on human life, prohibiting the operation of lotteries, and all that large body of legislation by which the regulation of labor is attempted.

When one begins to talk or think about "public policy," by which the economic soundness of all legislation of this sort is to be measured, he is confronted at the outset with the fact that it is a very vague and variable, or, as mathematicians say, a very unassignable quantity. This notion has crystallized itself many times in the law reports. Thus, for example, it has been said by a famous English judge that "public policy does not admit of definition, and is not easily explained" (Kekewich, J., in *Davies* v. *Davies*, L. R. 36 Ch. Div. 359, 364), and by the Supreme Court of the United States that "the application of the rule is more difficult than a clear understanding of it." (Bradley, J., in *Oregon Steam Navigation Co.* v. *Winsor*, 20 Wall. 64.) Again, it was a long time ago well said, in another English case, that public policy "is a very unruly horse, and

when once you get astride it you never know where it will carry you" (*Richardson* v. *Mellish*, 2 Bing. 229, 252), and, quoting once more from a recent English case, we find the court saying:

> "One thing I take to be clear, and it is this—that public policy is a variable quantity; that it must vary and does vary with the habits, capacities and opportunities of the public." (*Davies* v. *Davies*, *supra.*)

Lord Justice Bowen, also to the same effect, said not long ago in the High Court of Chancery:

> "The determination of what is contrary to the so-called policy of the law necessarily varies from time to time. Many transactions are upheld now by our own courts which a former generation would have avoided as contrary to the supposed policy of the law. The rule remains, but its application varies with the principles which, for the time being, guide public opinion." (*Evanturel* v. *Evanturel*, L. R. 6 P. C. 1, 29. Approved by Bowen, L. J., in *Maxim-Nordenfelt Guns & Ammunition Company* v. *Nordenfelt* (1893), 3 Ch. 630, 665.)

Nothing is more certain than the truth of these statements, which might be multiplied indefinitely from the law reports. They are iterated and reiterated by the judges every day.

> "Public policy is variable—the very reverse of that which is the policy of the public at one time may become public policy at another." (*Griswold* v. *Ill. Cent. R. Co.* (1894), 90 Iowa, 265.)
>
> "It changes with the changing condition of the times. It is hardly to be expected that a people who are transported by steam with a rapidity hardly conceived of a century ago, who are in constant and instant communication with each other by electricity, and who carry on the most important commercial transactions by the use of the telegraph, while separated by thousands of miles, will entertain precisely the same views of what is conducive to the public welfare, in commercial and business trans-

> actions, as the people of the last century, who lived when commerce crept slowly along the coasts, shut out of the interior by the absence of roads and hampered by an almost impassable ocean." (Sanborn, J., in *United States* v. *Trans-Missouri Freight Ass'n*, 58 Fed. Rep. 58, 68.)

Public policy differs also in different states and countries, as well as in the same country at different times. As people differ in their beliefs, opinions, aims, habits and surroundings, it is natural and inevitable that they should entertain different views as to what will best promote the public welfare. We need not stop to illustrate this simple and obvious rule.

From the fact that public policy is thus variable, it follows that no fixed rule can be laid down as to what is or is not contrary to public policy. We look to the law reports to find what, from time to time, has been adjudged upon the subject, and here we see in clearest perspective the variance to which we have just referred. Upon the most casual examination of the law books we instantly discover that cases declaring a rule of public policy in one year of grace are of very little or no value as authority in ascertaining what is the true rule on the particular subject in another and later year. For example, how would it do to cite the decision in the Dred Scott case, which was absolutely sound law at the time it was rendered, in one of the cases arising in the year 1903 between a railway company and its employes? We see that it is for the most part idle in discussions of this subject to-day to cite as authority, or even by way of argument, the decisions of the courts of half a century ago, or of even fifteen or a dozen years ago. What was absolutely right then may be absolutely wrong now.

This notion is well expressed by Lord Watson in a recent case in the House of Lords:

> "A series of decisions based upon grounds of public policy, however eminent the judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal. The course of policy pursued by any country in relation to and for promoting the interests of its commerce must, as time advances and its commerce thrives, undergo change and development from various causes which are altogether independent of the action of its courts. In England, at least, it is beyond the jurisdiction of her tribunals to mould and stereotype national policy. Their function, when a case like the present is brought before them, is, in my opinion, not necessarily to accept what was held to be the rule of policy a hundred or a hundred and fifty years ago, but to ascertain, with as near an approach to accuracy as circumstances permit, what is the rule of policy for the then present time." (*Nordenfelt* v. *Maxim-Nordenfelt Guns & Ammunition Co.* (1894), App. Cas., 535, 553, 554.)

Conceding, or better realizing, this inherently fluctuating character or quality of public policy, we see that the enactment of statutes to declare or define it must of necessity be a dangerous business, because such statutes, however accurately they reflect the public policy of the moment of their enactment, must *almost immediately begin to be wrong.* The common law, reposing, according to the legal fiction, in the bosom of the court, is flexible, and can change or be changed, as we have seen, with the change of condition; but a statute stands rigid on the statute book, and is the same thing yesterday, to-day and forever; so that it must be amended or repealed, or modified, or disregarded in the progress of time, as conditions change, in order not to be quite out of tune and touch with the orderly progression of things.

This is something which the rural legislator, in his zeal to pass laws upon the subject of trade, seems entirely to

have overlooked. Accordingly, this inexorable fact has been the undoing of much of his work. By reference to the law books, he is informed with sweeping generality that at common law monopolies are illegal and void. If he be industrious and curious, and reads Norman French, he finds out that, as early as the reign of Henry V., in the year 1415, a case (*Dier's Case*, Y. B. 2 Henry V., fol. 5, p. 26), which seems to have been the first of the sort, arose, in which a dyer had bound himself not to exercise his trade for half a year in the same town with the plaintiff. In an action on the bond, this was held to be an unlawful agreement, as in restraint of trade. This case was decided long before there was any statute on the subject, and from it has come down to us, in ordinary generation, a long line of decisions upon the general question there involved. At a later time patents or grants of the crown, in the nature of monopolies, to certain persons or corporations, secured to them the exclusive right to carry on some business, trade or avocation.

I need not recount the familiar history of the creation of these monopolies, commencing about the time of Henry VIII., or a little later. By the forty-fourth year of the reign of Queen Eilzabeth these grants had begun to attract the attention of the courts, and in "The case of Monopolies," reported by Lord Coke (11 Coke, 84*b*), they were declared to be illegal at common law. There was still no statute on the subject, and the argument ran back to the old case of the dyer in the reign of Henry V. (*supra*). In the case of "The Monopolies," which is the leading case upon the subject, it appeared that one Darcy had been granted the exclusive right to buy beyond the sea all such playing cards as he thought good, and to make and sell them within the Kingdom, that he and his agents and deputies should have the whole traffic and merchandise

in playing cards, and that no other should have the right of making playing cards within the realm.

> "All trades," said the court, "as well mechanical as otherwise, which prevent idleness (the bane of the commonwealth), exercising men and youth in labor for the maintenance of themselves and their families, and for the increase of their substance, to serve the Queen when occasion shall require, are profitable for the commonwealth, and, therefore, the grant to the plaintiff to have the sole making of them is against the common law, and the benefit and liberty of the subject."

It is upon such a key as this that a vast deal of discussion of this subject has proceeded thence to the present time. Serious men, and able and conscientious lawyers, have gravely argued in the United States, within the past few years, to courts of justice, in cases involving the legality of modern commercial trusts, along precisely this line, and have seemed not to understand that the case of "The Monopolies" and other cases of the same sort, are no more valuable as authority or available in argument in the twentieth century, upon the question of the legality of our commercial trusts, than if cited in a contention over the Monroe Doctrine.

The struggle of the English people against monopolies culminated in the passage of the statute of 21 James I., which attempted their prohibition. In a legal sense monopoly at the present day simply means the obtaining, without a grant from the sovereign, of the exclusive power to carry on a certain trade or business. In a popular sense, the term monopoly is applied to every large and successful business enterprise; and some statutes, as, for example, legislation against department stores, go so far as to seem to proceed upon the notion that, because an enterprise has attained large proportions, it is, in a legal sense, a monopoly—*ergo*, unlawful. Railways, national banks and corpo-

rations of all kinds are, in the view of that part of the public in sympathy with such legislation as this, obnoxious as monopolies.

Recurring for a moment to the idea that considerations of public policy are at the bottom of all sound legislation affecting combinations in restraint of trade, and that public policy is a changeable quantity in the problem, Lord St. Leonards, in a case in the House of Lords, decided a little after the middle of the last century, used the following notable language:

> "My Lords, there are just a few remarks that I wish to make upon public policy. I will not add a word to what has been already said by my noble and learned friends, but I will call your attention to what fell from one of the learned judges (Mr. Justice Cresswell) as regards the restraint of trade. That learned judge says that with regard to the restraint of trade, there is a maxim in common law, and he refers to a case in Year Books (2 Hen. V., pl. 26), to prove it; but the learned judge did not tell your lordships upon what that maxim was founded. Nobody supposes that there was any statute upon the subject in those times. Upon what, then, was that maxim founded? Why, upon public policy for the good of the realm. It was not good for the realm that men should be prevented from exercising their trades. Now, let us see what this particular case is; it lies in few words and remarkable consequences have resulted from it. It was an obligation with a condition that if a man did not exercise his craft of a dyer, within a certain town, that is, where he carried on his business, for six months, then the obligation was to be void, and it was averred that he had used his art there within the time limited, upon which Mr. Justice Hull, being uncommonly angry at such a violation of all law, said, according to the book, 'Per Dieu, if he were here, to prison he should go until he made fine to the king, because he had dared to restrain the liberty of the subject.'

> I wish to draw your lordships' attention to this case. Angry as the learned judge was at that infraction of the law, what has been the result of that very rule without any statute intervening? That the common law, as it is called, has adapted itself, upon grounds of public policy, to a totally different and limited rule that would guide us at this day, and the condition which was then so strongly denounced is just as good a condition now as any that was ever inserted in a contract, because a partial restraint, created in that way, with a particular object, is now perfectly legal. Without any exclamation of the judge, and without any danger of prison, any subject of this realm may sue upon such a condition as Mr. Justice Hull was so very indignant at in that particular case. That shows, therefore, that the rule which the learned judge, whose opinion is now before the House, thought depended upon some rule of common law, regardless of policy, was founded upon public policy, and has been restrained and limited and qualified up to this very hour, and beneficially so, by that very policy which it is supposed had no bearing at all upon the foundation of the rule." (*Egerton* v. *Earl Brownlow*, 4 H. L. Cas., 1, 237, 238.)

All legislation affecting monopolies, or combinations in restraint of trade, is meant to be, or pretended or intended to be, generally declaratory of the common law. This is especially true of the recent legislation upon that behalf in the United States. It has not, as far as I know, been attempted by any of these statutes from the first one, in the reign of James I., to the last one in the reign of Theodore Roosevelt, to make anything unlawful which was not assumed or supposed to be so at common law. The statute of James I. declared the law as it was understood then to be—as, for an example, it had been decided to be in the case of "The Monopolies," and all the later statutes have ostensibly done the same thing.

In this country prior to about the year 1889, the subject of monopolies, or contracts in restraint of trade, had not attracted the particular attention of our legislatures. Occasional decisions of the courts had assumed to prescribe common law rules, but no statute, state or federal, of any radical or strenuous character, had been enacted. During the two or three years prior to 1889, however, the attention of the public was called to the subject by the discovery that a large number of commercial trusts were in existence in the United States, which were or which were assumed or supposed to be, monopolizing, or tending to monopolize, various lines of business. This was assumed to be in violation of the rights of the public, and statutes were at once proposed to remedy what it was taken for granted was a growing evil. Men looked into the law and found in the old English statutes, and especially in the earlier reports, much crude denunciation of "monopoly," and much generalization upon the blessings and benefits of competition in trade. This, upon a superficial view, seemed to fit the case, and statutes were hastily drafted, and more hastily crowded through the legislatures of twenty or more states, under all sorts of partisan pressure, with the practical result, speaking generally, of declaring, in the United States, at the end of the nineteenth century, the common law of England of the fifteenth, sixteenth and seventeenth centuries.

These statutes, taking a general view of their intendment, declare the law as the English judges of more than an hundred years ago expounded it, with little or no regard to the changed conditions of business since that time. They write the dogmas of the pre-Revolutionary period into our statute law of to-day. This was not, perhaps, an altogether unnatural result of the widespread interest and attention that "trusts" created in the subject. Every one of these statutes—including the federal act of July 2, 1890,

known as the Sherman Law, to which a further reference will hereafter be made—is open fairly and honestly to the same criticism, viz., that they seek to crystallize into statutes doctrines of public policy which are obsolete or obsolescent, if not wholly outgrown and outworn. Nothing, as was suggested above, is easier than to generalize in a sweeping fashion about the evils of monopoly and the blessings of competition. A legislator can do a very large business in that line on a very small capital, and there is some excuse, we must admit, for the activity which, especially in hard times, has been displayed in that business.

Englishmen have always had what they have hugged to their hearts as a wholesome dread of monopoly. No Englishman ever knew—and no one of us can ever know—exactly what "monopoly" in this precious phrase means; but that it means something perfectly awful and to be shunned like the plague, no really sound Englishman ever doubted. It is a sort of bogey that has served to scare an hundred generations of them. So also, as of course, very much of the recent agitation which has arisen over monopoly, and which has provoked for the past dozen years a flood of legislation and litigation in the United States upon the subject, is the outcropping of the old grudge which the "have-nots" always have against the "haves." It gave the politicians a chance, of which they were not slow to avail themselves, and of which they have made the most.

It is a significant fact that during the same period of time when our legislatures, including the federal congress, have been going off upon a quasi-mediæval tangent, the courts have for the most part been unswerved, and have in no notable instance been carried off their feet by the popular clamor. A great number of suits have been brought, in which it has been sought to commit the courts to the same radical views upon the subject which have been enacted into statutes, and in which it has been sought to

secure adjudications upon the economic questions involved—for the most part, as I shall attempt hereafter to show, without success. And it is, I repeat, creditable to the courts that this is so. The decisions of the courts of last resort have, as a rule, in spite of the popular clamor, come down, year by year, in an orderly and consistent stream of precedent, substantially uninfluenced by the accidental excitement upon the questions of combination, competition and monopoly, which has more or less disordered the thinking of the soberest of us for the past dozen years.

The courts, in the greater number of cases, have accordingly reflected somewhat more accurately than the statutes, the public policy of the times. No doubt the decision in the case of "The Monopolies" formulated the views upon the subject at that time. But, thence to the present, there has been a constant relaxation of the rule as far as it affects trade and commerce. A long line of decisions, both here and in England, illustrate this; and for the reason just indicated it is to the decisions that we are chiefly to look, rather than to the statutes, for the more correct and intelligent view of the public policy of the period.

It was as we have already seen a long step from the blind bigotry of Mr. Justice Hull, in the dyer's case in 1415, to the temperate language of Lord St. Leonards at the middle of the last century. It is a longer step from that decision in the House of Lords, to the latest cases in point, which declare and define the public policy of the present day. Let us look for a moment at some of them, and, having seen how essentially public policy changed between the reigns of Henry V. and Victoria, we shall see how, within the past half century, the doctrine of greater or greatest freedom in trade has grown and developed in the hands of the judges. In a leading case,

more than twenty years ago, that consummate master of modern equity jurisprudence, Sir George Jessel, M. R., said:

> "If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into, freely and voluntarily, shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract." (*Printing, etc., Co.* v. *Sampson*, L. R., 19 Eq. Cas. 462, 465.)

This language is adopted and approved in a later case by Lord Justice Fry, and has been frequently quoted with approval, both in English and American cases relating to contracts in restraint of trade. Thus it is paraphrased in a recent Minnesota case as follows:

> "A contract may be illegal on grounds of public policy because in restraint of trade, but it is of paramount public policy not lightly to interfere with freedom of contract." (*National Benefit Company* v. *Union Hospital Company*, 45 Minn. 272.)

In 1894, in the House of Lords, the last remnant of the old rule which attempted to distinguish between partial and general restraints of trade, was swept away. Lord Herschell, in delivering his opinion in the case, said:

> "Whether the cases in which a general covenant can now be supported are to be regarded as exceptions from the rule which I think was long recognized as established, or whether the rule is itself to be treated as inapplicable to the altered conditions which now prevail is probably a matter of words rather than of substance. The latter is perhaps the sounder view. When once it is admitted that, whether the covenant be general or particular, the question of its validity is alike determined by the consideration whether it exceeds what is necessary for the

protection of the covenantee, the distinction between general and particular restraints ceases to be a distinction in point of law."

In the same case Lord Macnaghten said:

"In the age of Queen Elizabeth all restraints of trade, whatever they were, general or partial, were thought to be contrary to public policy, and, therefore, void. In time, however, it was found that a rule so rigid and far-reaching must seriously interfere with transactions of every-day occurrence. Traders could hardly venture to let their shops out of their own hands; the purchaser of a business was at the mercy of the seller; every apprentice was a possible rival. So the rule was relaxed. It was relaxed as far as the exigencies of trade for the time being required, gradually and not without difficulty, until it came to be recognized that all partial restraints might be good, though it was thought that general restraints, that is, restraints of general application, extending throughout the kingdom, must be bad. Why was the relaxation supposed to be thus limited? Simply because nobody imagined in those days that a general restraint could be reasonable, not because there was any inherent or essential distinction between the two cases. * * * The true view at the present time, I think, is this: The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and, therefore, void. That is the general rule. But there are exceptions. Restraints of trade and interference with individual liberty of action may be justified by the special circumstances of the particular case. It is a sufficient justification, and, indeed, it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned, and reasonable with reference to the interests of the public, so framed

> and so guarded as to afford adequate protection to the party in whose favor it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities." (*Maxim-Nordenfelt Guns & Ammunition Co.* v. *Nordenfelt* (1894), App. Cas. 535, 548, 564, 565.)

Turning from this late case in England to the later cases in the United States, we find the same trend and tendency in the opinions. Chief Justice Fuller, in a case in the Supreme Court of the United States, lately said:

> "The decision in *Mitchel* v. *Reynolds* (1 P. Wms. 181, decided in 1711) is the foundation of the rule in relation to the invalidity of contracts in the restraint of trade; but, as it was made under a condition of things different from those which now prevail, the rule laid down is not regarded as inflexible and has been considerably modified. Public welfare is first considered, and if it be not involved and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. The question is whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is or is not unreasonable." (*Gibbs* v. *The Baltimore Gas Company*, 130 U. S. 396, 409.)

In the famous case against the Sugar Trust, to which a further reference will hereafter be made, Mr. Justice Barrett, of the Supreme Court of New York, who tried the case at Circuit, in rendering his opinion, upon deciding the case, impressively said:

> "Excessive competition may sometimes result in actual injury to the public and anti-competitive contracts to avert personal ruin may be perfectly reasonable. It is only when such contracts are publicly oppressive that they become unreasonable and are condemned as against public policy." (*People* v. *The North River Sugar Refining Company*, 54 Hun. 354, 370.)

That was a notable decision and this is notable language from a judge at Circuit, at a moment when the public temper was inflamed against combinations of capital, in a case involving vast interests, when "kill trusts" was in the air, when the case had been tried with consummate ability upon behalf of the People, and argued to the court with an ingenuity and eloquence not often heard in these degenerate days in courts of justice, when all the ancient learning had been massed, when the sentiments of the middle age upon the subject had been most persuasively urged upon the court in rounded periods and polished phrase; and when a trial court might well have been excused for indulging in a little rhetoric in the popular vein. His honor after all calmly said:

> "Excessive competition may sometimes result in actual injury to the public, and anti-competitive contracts to avert personal ruin may be perfectly reasonable."

In a comparatively recent case in Minnesota we find this sober language:

> "Modern investigations have much modified the views of courts, as well as political economists, as to the effect of contracts intended to reduce the number of competitors in any particular line of business. Excessive competition is not now accepted as necessarily conducive to the public good. The fact is, that the early common law doctrine in regard to contracts in restraint of trade largely grew out of a state of society and of business which has ceased to exist, and hence the doctrine has been much modified, as will be seen by comparison of the early English cases with modern decisions both English and American." (*National Benefit Company* v. *Union Hospital Company*, 45 Minn., 272.)

While thus larger and larger commercial freedom has been attained in the progress of time, as public policy has adapted itself to more modern conditions, it is curious to

notice how, in some other directions and along some other closely parallel lines, the pendulum has swung the other way. Commercial contracts in restraint of trade have for one hundred and fifty years grown steadily in public favor, and have constantly secured greater and greater sanction in the courts, while in certain other analogous matters the reins have essentially tightened up. Take, for example, public opinion regarding lotteries. Only a comparatively short time ago lotteries were entirely legal. Columbia University, my alma mater in the law, lawfully secured some part of its endowment, some part of the very fund by which it is now nurtured and maintained, from the profits of a lottery operated in its interest in the city of New York. That was only something more than an hundred years ago. But now no one believes that any American university will soon secure an increase of its endowment in this way, and with the expiration of the charter of the Louisiana Lottery, all such business in this country became for the present legally impossible. (*Champion* v. *Ames*, 191 U. S., ——; *Francis* v. *United States*, 191 U. S., ——.) Public policy now strenuously condemns what a century ago it frankly sanctioned and approved.

For another example, consider the matter of wagers, from a legal point of view, and especially wager policies on human life. A century or so ago, wagers, and actions to enforce their payment, were sanctioned by the courts both here and in England, and all sorts of wagers were enforced by law. Thus no longer ago than 1790 it was adjudged to be "within the sound policy of the Kingdom" for the Court of Kings Bench to serve as a stakeholder between two persons who had made a bet whether or not another person had bought a wagon of a fourth. (*Good* v. *Elliott*, 3 Durnf. & East (Term Rep.) 693.)

Lord Mansfield, during the reign of George III., presided at a trial and charged a jury, with becoming gravity,

upon the astonishing question, which had been the subject of a wager between the parties to the suit, whether a third person, who wore the clothes and bore the name of a man, was a male or a female. The jury found that it was a woman. Subsequently, however, his lordship, upon a hearing before the whole bench, had the grace to say: "This case made a great noise all over Europe; and soon afterwards, I own, I was sorry." (*Da Costa* v. *Jones*, Cowp., 729, 734, decided in 1778.)

Still later came the famous litigation which the English courts entertained over what were known as the Napoleonic wagers, mere bets that the Emperor would or would not die within a certain time, or would or would not escape from St. Helena within a given time. In the infancy of life insurance, wager policies on human life were held lawful, but come now, like all other wagers, under what we are bound to regard the wholesome ban of our present public policy.

While non-commercial wagers of every sort have, in the process of time, become illegal, and are now so declared by statute in perhaps every civilized community, it is another curious illustration of the way in which freedom of trade asserts itself in these days that—*pari passu* with the decline in respect of legal sanction of mere wagers—dealing in futures, which are, of course, a form of wager, have become more and more legal and are now substantially lawful in all enlightened communities. It will certainly be but a short time until they will have the same unquestioned legal sanction as any other form of trading. It is already impossible to pass a federal statute making them unlawful, although attempts are made at almost every session of Congress to get a law of that sort enacted. In many of the states it is true that there are statutes upon the subject in which such dealing is more or less positively forbidden; but here again the courts have been and are in

advance of the lawmakers, and more in line with the most enlightened public opinion. In spite of much attempt to legislate such dealings out of existence, the courts have, by refining and distinguishing the statutes which have been improvidently enacted upon the subject, secured to them a substantially unquestioned legality everywhere. Other illustrations of the truth of this proposition will occur to every lawyer.

It always seems easy to people of a certain type of mind to believe that whatever strikes them as wrong in the world may be righted—according to their conception of right and wrong—by the enactment of a statute, and trusts have not escaped the full measure of the application of this fatuous notion. We have, therefore, had, as I have said, in the United States a very considerable amount of recent statutory law directed against trusts and monopolies. Almost every state in the Union has enacted one or more such statutes, and the Federal Congress has done the same thing. Passing by the state legislation, which might, if there were time, be profitably considered, let us look for a moment at the Act of Congress of July 2d, 1890, known as the Sherman Anti-Trust Law, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," to which a brief reference has already been made. The power of the Federal government in this behalf, it may be here observed, is derived solely from that clause of the Constitution which confers upon Congress the power "to regulate commerce with foreign nations and among the several states and with the Indian tribes;" this power, it will be noted, is one to regulate and not to destroy. It need, therefore, scarcely be said that assassination under the guise of regulation is not contemplated by this constitutional provision, and that consequently Congress can have no such power.

The Sherman Act, speaking generally, declares unlaw-

ful every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations; it makes every violation of the act a misdemeanor, and provides for punishments by fine or imprisonment, or both; it also declares unlawful monopolies and any attempt to monopolize or any combination or conspiracy to monopolize any interstate or international trade, and makes every such contract a misdemeanor; finally it provides for the forfeiture of any property the ownership of which is involved in any such illegal proceeding, and gives a right to the injured party to sue for triple damages and a reasonable attorney's fee. This statute has now been in operation for something more than twelve years and a half. It has been the statute law of the land for all that time. We may therefore now not unreasonably ask what has been accomplished under it. In passing, it may be said that this statute is merely declaratory of the common law on the subject. It makes nothing unlawful that was not unlawful by the law of the land before it was enacted; all these proscribed offenses were illegal as much before as after the passage of the act. The statute, however, prescribes a procedure, and fixes pains and penalties and forfeitures, and formulates the law in a convenient way.

According to an official publication issued by the Department of Justice, at the end of the year 1902, there have been instituted and prosecuted by the Federal government, under this act, in the Federal courts, up to this time, twenty-six suits; and, including such suits as have been brought by private individuals under the act in the Federal courts, there have been in all fifty-three cases decided under the act. Of the suits instituted by the Federal government the greater number have resulted in the partial or total discomfiture of the prosecution. The fact that only twenty-six suits have been brought by the Federal

government in about thirteen years—that is, prosecutions under the act at the rate of two suits per annum—may intimate to us that the evil sought to be remedied by the statute has not been regarded at the Department of Justice as very widespread or very flagrant; and the further fact that only *about four suits per annum*, including the government suits, have been prosecuted to a decision throughout the whole of the United States, seems to suggest that no very great number of the people have smarted seriously under the impositions and wrongs to which they have been subjected at the hands of the trusts. Men who suffer legal wrongs are usually quick enough in this country to go to law about them. It is therefore significant in face of the flood of desultory denunciation of trusts in the newspapers and from the stump, *that, in twelve years and a half, less than two score of plaintiffs* have been found in all the length and breadth of the land to prosecute suits to judgment under a statute which gives them a right to triple damages, with costs and their attorney's fees, for any injury they establish.

But even this doesn't state the case as strongly as it can be stated in favor of the trusts. Eliminating the government suits from the list of fifty-three cases decided, less than thirty remain, and in more than half of these the plaintiff was defeated at the trial. Thus a careful analysis of this official list shows that *about one person per annum in the United States, out of a total population of more than seventy-six millions*, has secured a judgment under this act against some corporation or trust held to have violated the law. That would seem to be a result somewhat out of proportion to the hue and cry everywhere set up over trusts. Some of us may be pardoned for reading into these figures something more than a suspicion that all this clatter and manufactured wrath about monopolies and trusts is, as a matter of fact, the merest crackling of thorns under a pot.

Turning to the twenty-six suits in the list as being those instituted and prosecuted by the government to date, we find that the United States as complainant lost eleven of them outright; that two are still pending; two practically a draw—neither side accomplishing anything substantial —and that one was a trifling litigation, somewhat beneath the dignity of a sovereign power. That leaves, out of the twenty-six suits, ten in which the government won. Of this ten, four were won against combinations of laboring men—leaving six as the total number in which the United States have prevailed thus far in litigation against trusts strictly so-called. Of this six, three were cases in which the offense proven was clearly illegal at common law, and in which a decision for the government could have been secured as well without the statute as with it; two others of the six were what might be called legal boomerangs—the reference here being to the Trans-Missouri Freight Association case and to the Joint-Traffic Association case. In both of these suits the success of the government in the outcome has been—it is not telling tales out of school—very generally regarded by the friends of litigation of this sort as supremely unfortunate.

In each of them there was an application of the Sherman law to railways—something which it has been strenuously insisted was not within the contemplation of Congress when the statute was formulated and enacted—and both of these decisions make unlawful traffic or pooling arrangements between what are known as parallel and competing lines of railway. As a result, the railways have been compelled to abandon those particular forms of association or arrangement *inter sese*, and the practical and substantial net result to the public from the victory of the government in these two cases has been the creation, in their place and stead, of such larger consolidations as the Southern Pacific Company, and the Northern Securities Com-

pany, and the absorption of the Baltimore & Ohio by the Pennsylvania Railroad; so that the Trans-Missouri Freight Association case and the Joint-Traffic case, whatever else they may have been worth to the enemies of monopoly, may, in a very proper sense, be declared to be God-fathers both to the Great Southern and to the Great Northern railway mergers—a result which cannot be exceptionally gratifying to the promoters of such litigation.

Haec fabula docet that if the litigation now pending against the Northern Securities Company shall result in a legal victory for the government, or for the state—a very remote contingency—it will be all very well and just the same, forsooth, as far as the public is concerned. We shall then have in its turn the "Southern Insecurities Company, Limited," or some other substantially equivalent devise, to take the place of the present merger organization, and to accomplish in some other way the same end. At the very best for the prosecution it can only be another Sugar trust case. *The thing itself called "the merger" will survive any lawsuit, and will remain and persist.* It is now, and as of to-day, a *fait accompli*, and the hands of the clock in such matters do not go backward. To all such destructive litigation—of which this is here taken only as a type—we interpose a revised version of an old legal maxim: "*De maximis non curat lex;*" and herein consists the applicability thereof. It interposes, along the broadest economic lines, an equitable demurrer to the jurisdiction; the case is not set for trial in the proper forum, and the decree, whatever it may be, will in a catholic sense be *coram non judice.* We admit all the complainant's formal case and then move for judgment for the defendants.

This is what I mean: Some things, some sorts of things, are for the courts and the judges, and some things, some sorts of things, are of an essentially extra-judicial cognizance. In a free country it is inevitable that we go to law

over trifles; that is to say, about things trifling as compared with great economic tendencies, with slow evolutions, with centuries and cycles of human development and progress. Courts and statutes have been established and enacted in contemplation of this truth. Our rational conception of the true and inevitable jurisdiction of the courts has these metes and bounds. Some things we instinctively hold too large for the judicial pint pot, however much they seem to come within the formal language of some statute. Thus, where the butcher sues on his past due account and gets his judgment for $18.14, including his interest and costs, it squares with our conception of a due administration of justice. Why shouldn't one pay for his chops and steaks? Another forecloses his mortgage and enters into possession; a third probates his father's will and that is right enough. Then again the machinery of our criminal law makes it safe for us to go about o' nights, and protects our exposed property. Of such is the scope and purpose of our law. For these things and for other things like these were courts and statutes and law and lawyers devised.

Moreover, it is the proper function of the law to do what it can and not to try to do what it can't. Mrs. Partington with her broom was all very well in the face of a puddle in the back yard; but when it came to sweeping away the Atlantic ocean—well, that was another story, and the good lady found it out. In the small joke that even the creative power of the Almighty must, in the very nature of things, fall short of the ability to make a two-year-old calf in five minutes, there is the easy suggestion that it is as much beyond the contrivance of the average legislature or legislator to devise a statute which can stay an inevitable trend and tendency in the trade and commerce of mankind, and how beside and beyond the wit of man it must ever be to prosecute successfully a litigation which thwarts and op-

poses itself to what the gravity, and the centripetal forces of the new century are imposing upon us and our business affairs. In such a matter as lies at the bottom of this "merger" litigation—of which the formation of the Northern Securities Company is but a symptom or a suggestion —we find ourselves, when we take a large view of the whole situation (and it is idle and like an ostrich to take any other view) face to face with the infinities, with gravity and the inevitable, with the eternal verities, with things too big, too imperative, too elementary for courts and statutes and the paid wrangling of attorneys before the bar.

Coming back to the Federal statute, and looking over the whole field, and having regard to all the litigation undertaken or pending under the present law, it is not intemperate or unfair to say that the Sherman Law, although drawn by competent lawyers and with the greatest care, has been found utterly inadequate to check or to mitigate any of the alleged social evils to which reference was made in its enactment; neither has the passage of the statute, and its presence in the statute book, had any—even the smallest—deterrent effect, as far as can be perceived, as to the creation of new trusts. As Judge Grosscup of the Federal Court in Chicago pointed out, in a recent address at the University of Nebraska, it appears that of the one hundred and twelve presently subsisting and active trusts in the United States, all but thirteen have been created since the passage of the Sherman Act. This statute, therefore, seems to have not even the slightest tendency either to do away with trusts after they are created or to prevent their creation. We may, therefore, be excused for wondering what such a statute is good for, or whether it is good for anything. And from what has been accomplished in these dozen years under the Sherman Law we may "guess," as a Yankee might say, what is likely to be accomplished in future by amendments thereto, and by the

further legislation of similar sort now proposed or pending in Congress, or elsewhere.

We may perhaps find some illumination upon this point in considering for a moment what happens in the case of some other statutes that fly in the face of the commercial community and thus attempt the impossible. Such statutes are about the most useless of all useless things. For example, there is in New York a highly penal statute against usury—something always especially hateful to rural legislators—and yet millions of dollars of paper daily are frequently bought and sold and discounted in that state in flat defiance of the statute, to which as of course not the slightest real attention is ever paid when the market rate for money is different from the statute rate; so that if one might have in exchange for a lifetime of toil the proceeds in cash of a single hour's output of paper tainted with usury in Wall street in a tight money market, he would have a glut of riches. The statute is not enforced because it is absurd and unenforceable, and because the commercial community very properly resents such legislation, and recognizes that it may safely ignore such statutes as run counter to the established and subsisting order of things.

We laugh now at the Pope's bull against the comet (but men took it seriously enough then), and at the decree of the Convention re-establishing God and the immortality of the soul from one end of France to the other, which was serious and solemn business among a highly intelligent people little more than an hundred years ago. When are we to begin to see the humor in the fantastic notion that a federal statute known as the "Sherman Act" can block the wheels of our business enterprises, can put a stop to the progress of our affairs, and stay the inevitable in the evolution of our system of transportation by rail lines? Once we had stage coaches, and mail carriers on horse-

back, then little rail lines from A. town to B. town; then the first consolidations; then the trunk lines; then systems; now mergers, or whatever you care to call them. To-morrow it will be something else, larger and fitter for the service in a progression as certain as the tides and as resistless as gravity or death. As well might Sherman acts be directed against the stars in their courses; as well might courts seek to block the recurrence of the seasons. What sort of a statute, or what kind of a court does any man now think could have prevented the passing of the stage coach, or of the local railway; or by what solemn pronouncement of a court of law could the recent railway consolidations and reorganizations have been prevented? By what sort of a writ of injunction or by what cunningly devised mandamus shall we regulate the rising of the sun and the going down of the same? *There are some things that courts and statutes cannot do.* Judges and lawmakers who set themselves against a well-defined tendency in things, who try to stem a tide, make little progress, and all who row against the current of Niagara are buried in the same grave.

All the allegations of these bills of complaint that are solemnly drawn up against this or that trust may be true, a thousand times true, and more. No doubt they are. But the question really at issue is economic rather than legal. It is not a case for lawyers and law courts. It involves issues too big for a mere pleader—issues to be tried and worked out and finally decided, not by any judge, however wise; not according to any formal statute, however craftily it may have been drawn. If the Northern Securities Company—taken now merely as a type—stands for something useful, it is big enough to take good care of itself. No statute and no court can harm it very much. If it cumbers the ground it will die of itself. If it have in it the seeds of death it can't be kept long alive by all its nurses. *And it*

can't be talked to death or sued out of existence if it is serving some economically useful purpose in modern American railroading. Whether it is or not, time and not litigation will tell. It is on its trial to-day much more in the forum of public opinion and in the fiery furnace of our present economical competition than it can ever be in any court of law. Its life and death struggle will be in the field, not before any judicial tribunal.

We need not go far afield to find evidence in support of this view. How many times, for an example, has the Standard Oil Company, within the past dozen years, been solemnly adjudicated and legislated out of existence; and in how many court houses and state houses, from one end of America to the other, has its death warrant been signed and sealed and read out to a waiting world with unction and emphasis? God knows. And yet in spite of all it was never more alive, more virile or more efficient than now —and no one at any time has ever seen any crepe on the big door at 26 Broadway. Let not the shoemaker go beyond his last. *De maximis non curat lex.*

Some other recent litigation against trusts under state statutes or at common law has been so notably barren of results that it may instructively be considered at this point. Take for example the famous Sugar-trust litigation in New York, to which I have already made some passing references. A few years ago the state of New York, by its attorney general, commenced two suits in the Supreme Court of that state, the purpose of which was to destroy the Sugar Refineries Company, then popularly known as the Sugar trust. These actions were pressed with much legal intelligence and vigor, and, after a sweeping victory in the lower court, resulted in a judgment in the court of last resort to the effect that the trust was illegal, and could not lawfully transact its business in that state. Thereafter, and to carry out the provisions of this solemn adjudica-

tion, some part of the property of the trust was placed in the hands of receivers; but in a surprisingly short space of time the judicial machinery ceased to work, and the property was returned into the hands of its owners by due process of law. Presto! The trust was reorganized as a corporation under the laws of an adjoining state, and from that day to this it has uninterruptedly carried on its business, as a New Jersey corporation, at No. 117 Wall street, with precisely the same force and effect *as to the public* that it formerly did as the Sugar Refineries Company.

Thus, a vast deal of time and money and effort were spent in New York in driving the sugar refiners of that state across the North River for a charter, and in compelling them slightly to change *the form* of their organization, but without to the extent of one iota altering *the conditions* under which they do their business. When the suits were brought they were doing their business in a prudent and economical manner, and it was not possible by litigation to drive them into doing it in an imprudent and unprofitable manner. It ought to have a sobering effect upon some of us here in Minnesota to reflect upon the fact that all the money that was spent in that litigation, and which resulted in absolutely nothing as far as the public is concerned, had to be repaid by that same short-sighted public, part of it in the shape of taxes to the state of New York, and the rest of it in the prices the public was called upon to pay for sugar. The state was sure to collect the taxes, and the sugar people not unnaturally wanted back from the community what money they had been compelled to spend in that Quixotic litigation.

The railway situation in England throws an interesting side-light on the subject. In 1872, a report was made to Parliament by a committee theretofore appointed to investigate and report back the condition of the English railways. The report of this Select Committee on Railway

Amalgamation contains much illuminative matter and particularly makes the significant statement that, from the commencement of railway construction in England down to 1872, Parliament and the English courts alike had united in vigorous efforts to prevent the consolidation of independent railroad companies in that country; that during the same period of time, charters had been granted by Parliament to over six hundred railroad companies; but that in 1872 the railway business of the Kingdom was substantially performed by no more than about six companies. At the same time the English people are well served by their common carriers; they have costly roadbeds, fast, punctual and an exceptionally safe service, and rates only somewhat above the lowest that are charged by any railroads in the world.

The same thing has been equally true in every part of the United States, in respect to railway consolidation. Thus, in New England every sort of effort was made, both by statute and by litigation, to prevent railway combination, but to-day three consolidated companies control about all the railway business that is worth controlling in the six New England states. So in New York, where we find the New York Central made up of a half score of smaller companies; in Pennsylvania, where the Pennsylvania Railroad controls almost the entire carrying business of the state. In the South, where three or four amalgamated companies do almost all the carrying business. We have all of us everywhere tried manfully to prevent combination among railways throughout the United States, certainly with no large measure of success. Isn't it high time for even the dullest of us to learn that it can't be done?

Within the limits of no state in the Union is this to be seen in a clearer perspective than in the state of Texas. At the end of the Civil War, Texas had comparatively

few miles of railway and no communication whatever by rail with the outside world. As soon as railway construction commenced there, statutes of the most stringent character were enacted against the consolidation of independent companies. In 1875, the Constitution of the state went to the extreme of the language in forbidding every such concert or combination, and a State Railroad Commission with plenary powers was duly created to safeguard the public interest along these lines. Suits have also been repeatedly prosecuted by the state authorities to check and prevent amalgamation. As a net result of all these visionary doings, Texas now has something over ten thousand miles of well-built and well-equipped railroad, substantially all of which fall into one or other of three systems, and with a single exception, which for the moment exists but does not much make against the rule, all the railroads of any commercial consequence in that state are substantially owned and absolutely controlled by three gentlemen who live near together, not far from the corner of Fifty-seventh street and Fifth avenue, in the city of New York.

Although there is criticism of trusts in plenty, and although we have had for many years a wealth of suggestion on the subject, it is not easy to find out and to formulate exactly and precisely what the critics would like to have. This difficulty seems to have confronted the pleaders in drafting their bills of complaint in the various suits that have been brought against trusts. It is found to be far easier to deliver one's self in rounded phrase upon the evils of monopoly, and to prate piously about the oppression of the poor, than to draw a pleading in a suit in equity so as not to have it demurrable. We may infer from the legislation we are having that the drafters of statutes against trusts have likewise been confronted with the practical difficulty of putting down on paper some-

thing that will stick. Nor has it been found easy, even after the suit is brought and a demurrer to the complaint overruled, to make intelligent and adequate proof of the wrongs complained of. Much of the testimony offered on behalf of the complainants in such of these trust cases as get to trial has been puerile and grotesque; so that, on some familiarity with the testimony in many of these cases, one is not surprised to find either that so few suits are brought, or that so few of those tried result in judgments against the trusts.

In one case brought under the Sherman Law, to which my attention has lately been called, (*Whitwell* v. *Continental Tobacco Co.*, Circuit Court of Appeals for the Eighth Circuit, May. 1903), where the complaint bristled with allegations of wrongdoing on the part of the defendant trust, it turned out, upon a careful sifting of the material allegations of the bill, that the gravamen of the complaint, and the only specific wrong actually alleged, was that the trust—a private corporation—refused to sell its product to the complainant on terms attempted to be dictated to it by the complainant, but that on the contrary it insisted upon its right to do its own private business in its own way and on its own terms. Lawyers find little difficulty in drawing their pleadings when a plain violation of law is to be stated, and little trouble in proving their cases, when they have got a case to prove; but the mouthings of blatherskites about "monopolies," and frothy twaddle about the evils of "combinations" and the hidden iniquity that lurks in "conspiracies against trade and commerce," when reduced to writing, or, as a mathematician would say, when reduced to their lowest terms, whittle down very thin.

What then really is it that the critics want? Do they want to regulate trusts in the public interest, or to regulate them out of existence? Do they want prices higher or lower? If so, what prices, the prices of their own prod-

uct or those of other people? Do they want more business done, or less? Do they want to press the oak back into the acorn, and relegate our business to primitive conditions? We know exactly what Andrew Jackson wanted. His ideal twentieth-century commonwealth was to get on without banks. He frankly put that in writing, gave his reason and signed his name to it. We wish that our ingenuous anti-trust friends, instead of treating us to generalities, and wearying us with declamation, would be as specific in their statements, and tell us precisely what they want and why they want it. Their propaganda is too vague, and the remedies they propose out of all proportion to any mischief in sight. It is an amazing fact that during the present session of Congress more than one hundred different so-called anti-trust bills have been introduced in the two houses, proposing more than an hundred cures for as many alleged public grievances in the nature of trusts; of the best of which bills it may be confidently asserted that they are no whit better than the Sherman Law and of most of them that they seek to enact impossible and transparent nonsense into our Federal statute book.

Sometimes it is over-capitalization and watered stock that are the subjects of their animadversion; and it is sometimes pretended that there is some mysterious ratio or relation between the amount of the nominal capital stock of a concern and the price it can get in the market for its goods, or, to state it in another way, that dividends must be earned on watered stock and that that consideration fixes trust prices. People who know anything know better than that, but still this sort of nonsense goes about and does service sometimes as an anti-trust argument. No amount of knock-out is able to kill it. One-half minute's sober thinking should, it seems, make an end of this exceptionally imbecile proposition. If any man thinks that increasing his nominal capital stock will have any tend-

ency to increase the earning capacity of his property, let him try it; and if any man sees any connection between the capital stock of the corner grocery and the price of soap and candles, except possibly as the larger capitalization makes a little for lower prices on the average—why, we can't stop to argue with him; and if anyone thinks that a railway capitalized at sixty thousand dollars a mile can charge twice as much for the transportation it has to sell as a railway that is capitalized at thirty thousand dollars a mile—or any fraction of a cent more because of its greater capitalization—why, that man is a hopeless case. The sober fact is that over-capitalization cures itself, so far as there is any call for a cure; and as for watered stock the market usually takes very good care of that. The late ex-Speaker Reed, in the article already referred to, in speaking to this point, aptly says:

> "But cannot we stop this stock watering? Must we not do it? Well, the value of stock is very much a matter of opinion. It will be noticed that the stock of one of our greatest companies can be bought for less than forty dollars. The par value is one hundred. In the judgment of the world there is sixty per cent water, and in the market the water is squeezed out. Could a legislature do it more effectually? As that same stock once sold at fifty-five, there was a time when there was only forty-five per cent of water. Is it proposed in the new constitutional amendment to specify how often the test for water is to be applied? Are the stockholders to be assessed daily for the variations of each day, or are the directors to be indicted daily? Shall officers of the Government determine the value, or the public in open market?"

Then, again, we hear that publicity is the cure-all; but here again only a little reflection serves to advise us that free men cannot be compelled, in a free country, by a statute, to disclose what they wish to conceal about their busi-

ness concerns. People who are sanguine on this point had better study railroad reports a bit, to gain a realizing sense of the capacity—rising almost to genius—that men sometimes display for not disclosing things. Some of these documents put Talleyrand to the blush. Again Mr. Reed well says:

> "Almost everybody announces that what we need is 'publicity.' Even this is vague. Do you expect the public to be intrusted with the cost sheets? If you do not, then what will your publicity amount to? If you mean by 'publicity' such a statement as will enable the outsider to buy wisely, or the stockholder to sell at the true value, I fear we may be going beyond the province of free government, which certainly thus far has left the task of keeping his fingers out of the fire to the citizen whose fingers they were."

Next comes a Solon with a bill up his sleeve for limiting fortunes to, say, a maximum figure of ten millions of dollars. Two such measures are now actually pending in Congress, and one or both of them may become laws. A scoffer has suggested that it would have been better to provide for a minimum of no more than one hundred thousand dollars for each adult male in the country. So far from any such beneficent provision, however, it is by these enactments proposed, on the contrary, to confiscate or forfeit any personal holdings of property in excess of the millionaire figure named. It might be just as well, before relying too much on a remedy of this sort, to devise some workable scheme for collecting personal property taxes, which are only a sort of legal confiscation annually of a small per cent of the great fortunes proposed by this legislation to be confiscated at once and *in toto*. Until we can collect the penny once a year we had better not try to take the pound in fifteen minutes.

It is the function of a critic to criticise, and, at this moment being only a critic, I have not attempted to suggest what legislation of this sort, if any, might be expedient and politic; but rather to point out what appears to me to be the inherent weakness and inutility of the existing statutes of this character. There is, it goes without saying, such a thing as an unlawful restraint of trade, which is and ought to be contrary to public policy. My proposition is, however, that the legislation upon the subject in the United States, both state and federal, has thus far been for the most part the outcome of a condition of the public temper not calculated to promote sane legislation; that it has been out of joint, and out of line with the most enlightened public policy; that all such legislation is unscientific, impolitic and fatuous, and that it cannot abide the wear and tear of even the next short time. The furore which occasioned it is already subsiding, and the country will grow more and more away from it, and leave it standing as a monument to the over-zeal of ill-instructed or half-instructed legislators.

It will in the end do no great harm, and it will do some good if it serve as a warning to future lawmakers, that statutes which fly in the face of enlightened public sentiment had better not be enacted, and will not be enforced by the courts of a free country; that such statutes have no place in the *corpus juris* of an highly civilized commercial community; that water cannot be legislated to run up hill; and, finally, that it is the true function of the legislator to catch the spirit of the time and the drift of affairs, to reflect them in his work, and laying aside his ill-digested theories and his academic speculations as to what might, in Utopia, be ideally excellent, to do, in the matter of statute making, what he can, and not try to do what he cannot.

Gentlemen of the University: I have not believed that upon such a subject as this I ought to come to you with a loose, extemperaneous harangue, or to address you with the fopperies of rhetoric; I have therefore brought you in sober phrase the message with which I have felt myself charged. It is for university men to lead, and not to follow, the thinking of their generation; to be, on such questions as we have now been considering, not Andrew Jacksons, with minds befuddled over South-Sea Bubbles, but rather Nicholas Biddles, in the forefront of the best thought and the wisest action in the matter; not to be of the number of those who, ignorant or heedless of the plain teaching of history and of the elementary verities of social science, run madly now after one and now after another political heresy, abandoning to-day what yesterday they preached for very truth, and to-morrow denying and protesting against the ism of to-day, outgrowing one folly only to grow into another. It is for you to contribute something to national sanity on national questions; not only to be sane and virile yourselves, but also to communicate your sanity and virility to the commonwealth; to be factors in building up and not in pulling down; to set your faces against crude theories and hasty generalization on political questions, and to be no party to the venting of blatant nonsense in high places; to be clear enough of mental vision calmly to realize, in the face of popular clamor and partisan clack, that a pop-gun, as Emerson phrases it, is only a pop-gun, though the ancient and honorable of the earth proclaim it to be the crack of doom; to gird up the loins of your minds against the intellectual follies of the unthinking multitude, who yesterday feared savings-banks and incorporated companies, who to-day shiver at trusts and mergers, and who to-morrow will be possessed of some new madness; to lay about yourselves lustily and well, at the outset of your several careers, to the end that

you may be, intellectually, materially and morally, of the elect order of the "haves" and not of the "have-nots"; that you may produce something in your day and generation, and acquire something good for yourselves and others, as God shall give you scope and opportunity; that you may, in the strenuous existence of to-day, be something better than blind leaders of the blind; and that thus, in a broad and comprehensive sense, you may be in life, as it is given you to live it,—not outsiders, good for nothing, but insiders, good for something, for of such is the Kingdom of Heaven.

CHARLES F. BEACH, JUN.

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